JOURNAL

OF

COMPARATIVE LEGISLATION

AND

INTERNATIONAL LAW

EDITED FOR

THE SOCIETY OF COMPARATIVE LEGISLATION

BY

Sir ARNOLD McNAIR, C.B.E., K.C.
Assisted by Professor H. C. GUTTERIDGE, K.C.

Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

THIRD SERIES VOL. XXVIII PARTS III & IV

LONDON:
SOCIETY OF COMPARATIVE LEGISLATION
26, OLD BUILDINGS, LINCOLN'S INN, LONDON, W.C.2
1946

[*All Rights reserved*]

All communications to be addressed to the Hon. Editor,
26, Old Buildings, Lincoln's Inn, London, W.C.2.
The Annual Subscription to the Society is one guinea. (Canada and U.S.A. $5.)

Printed in Great Britain by
Hazell, Watson & Viney, Ltd., London and Aylesbury
8300-46

CONTENTS OF VOLUME XXVIII

PARTS III and IV

PAGE

THE TREATMENT OF "FRUSTRATION OF CONTRACT" IN FOREIGN LEGAL SYSTEMS[1] 1

SCOTS LAW
Contributed by the RT. HON. LORD COOPER, Lord Justice-Clerk

UNION OF SOUTH AFRICA
Contributed by PROFESSOR R. W. LEE

FRENCH LAW
Contributed by M. RENÉ DAVID

GERMAN LAW
Contributed by DR. E. J. COHN

NATIVE TRIBUNALS 25
Contributed by A. N. DOORLY, ESQ.

THE DOCTRINE OF PRECEDENT IN CONTINENTAL LAW 34
Contributed by DR. K. LIPSTEIN

FRENCH LEGISLATION IN EXILE 44
Contributed by DR. BENJAMIN R. PAYN

THE FIRST INTERNATIONAL LABOUR ASSOCIATION 53
Contributed by MISS GERTRUDE TUCKWELL, C.H.

THE NEW GREEK CIVIL CODE OF 1946 56
Contributed by PROFESSOR P. J. ZEPOS, LL.D.

CONSCIENTIOUS OBJECTORS IN GREAT BRITAIN AND THE DOMINIONS . . 72
Contributed by R. S. W. POLLARD, ESQ.

CHANGE OF "CHRISTIAN" NAME 82
Contributed by DR. F. M. GOADBY

A NOTE ON THE CROWN LANDS IN THE COLONIES 87
Contributed by DR. C. K. MEEK

APPLICABILITY OF THE DOCTRINE OF EXTRA-TERRITORIALITY TO LEGISLATION BY THE INDIAN LEGISLATURE 91
Contributed by S. D. SHARMA, ESQ.

LABOUR CONDITIONS IN SOUTH AUSTRALIA 96
Contributed by MISS M. CECILE MATHESON

"FACT" OR "LAW" IN AMERICAN INCOME TAX LAW 99
Contributed by A. FARNSWORTH, ESQ.

TRIAL BY JURY IN INDIA 104
Contributed by A. G. PULLAN, ESQ.

SOME GERMAN VIEWS ON THE CONFLICT OF LAWS 109
Contributed by PROFESSOR B. A. WORTLEY

THE NATIONALIZING OF THE LABOUR MOVEMENT 115
Contributed by PROFESSOR D. MITRANY

NOTES ON IMPERIAL CONSTITUTIONAL LAW 117

CANADA
Contributed by PROFESSOR JOHN WILLIS

SOUTH AFRICA
Contributed by W. POLLAK, ESQ.

NOTES:

Consolidation of Local Acts. C.T.C. 122

The Institute for the Unification of Private Law. H. C. G. . . . 123

Unified Law in Canada. H. C. G. 124

The Mexican Free School of Law. V. R. Idelson 124

Legal Aid. A. Hassard Short 127

[1] Further articles in this series will appear in ensuing numbers.

NOTES—*continued* PAGE

Trust Systems in the American Republics. F. M. G. 128
The Microfilm for Lawyers 129
Bathing Huts at Alexandria. F. M. G. 129
A Library of Foreign Law 131
Bankruptcy Treaties 131
Roman and Comparative Law. F. M. G. 132
The Law of Colombia 132
Marriage Bar in the Civil Service 132

NOTICES OF BOOKS :

Schnitzer, Adolf F., *De la Diversite et de l'Unification du Droit.* Macmillan. 133
Stone, Julius, *Recent Trends in English Precedent.* P. H. Winfield . . 134
Wight, Martin, *The Development of the Legislative Council.* E. C. S. Wade . 135
Bradway, John S., *Legal Aid Clinic Instruction at Duke University.* Robert Egerton 136
Peaslee, Amos J., *United Nations Government.* E. C. S. Wade . . . 138
Wheare, K. C., *Federal Government.* K. K. 139
Ramaswamy, M., *Distribution of Legislative Powers in the Future Indian Federation.* K. K. 140
Domke, M., *Trading with the Enemy in World War II.* B. A. Wortley . 140
Roman and Roman-Dutch Law. F. H. Lawson 143
Webber, G., *The Effect of War on Contracts.* R. P. F. Roberts . . 144
Gottschalk, R., *Impossibility of Performance in Contract.* R. P. F. R. . 145
Lauterpacht, H., *An International Bill of the Rights of Man.* J. Maxwell Garnet 145
Discours sur le Code Civil Hellenique. C. J. Hamson 147
Tomlinson, John D., *The International Control of Radiocommunications.* R. Y. J. 148
Scritti Di Diritto Romano in Onore di Contardo Ferrini. D. Daube . . 148
Burchell, Charles J., *The Statute of Westminster and its Effect on Canada.* E. C. S. Wade 150
A Guide to the Law and Legal Literature of Mexico. C. E. A. B. . . 150
May, Sir Thomas Erskine, *Parliamentary Practice.* E. C. S. Wade . . 151
Lachs, M., *War Crimes : An Attempt to Define the Issues.* J. L. Brierly . 154
Jenks, C. Wilfred, *The Headquarters of International Institutions* . . 154
Bentham, Jeremy, *The Limits of Jurisprudence Defined.* C. T. C. . . 155

FRUSTRATION OF CONTRACT IN SCOTS LAW *

[*Contributed by* The Rt. Hon. Lord Cooper, LL.D., *Lord Justice-Clerk.*]

As clearly appears from the latest Scottish appeal,[1] the doctrine of frustration of contract is common to the jurisprudence of both Scotland and England. Its later refinements and developments, dating from the first World War, have proceeded on parallel lines on each side of the Border. With certain important exceptions to be noted below, the expositions contained in the numerous decisions of the House of Lords in English Appeals and of the Judicial Committee of the Privy Council would in the main be accepted in Scotland.

But the process of assimilation is not complete and it will never be complete; for the juridical principles on which the maturing doctrine now rests have been approached in Scotland from an individual standpoint and have been evolved by a different process of reasoning against a different legal background. Though two streams of thought have now in large measure coalesced, their sources lie far apart and each has flowed through its own juristic channel.

The key to the Scottish treatment of this problem (as of so many others) is to be found in four cardinal features of Scots Law. (*a*) With us law and equity have never been separated, and equity has tended to predominate. (*b*) We buried our forms of action in the Middle Ages, and have never allowed them to "rule us from their graves." (*c*) The doctrine of consideration, as understood in the Anglo-American law of contract, has no part in our system. (*d*) During the formative period of modern Scots Law the chief source of inspiration was found in the Roman Law of the later Commentators—a model which was rarely slavishly copied, but which has left a deep and permanent mark on many chapters of our law.

In any scientific account of the developed doctrine of frustration the subject would almost inevitably be treated as one of the methods by which contractual obligations are discharged. Paradoxical as it may appear, it was never from this angle that the subject was approached in Scots Law. The germinal ideas of frustration appeared in Scotland not in answer to the question whether a contract should be dissolved by operation of law by reason of certain supervening changes of circumstances, but in answer to the far wider question how the relations of two parties should be equitably readjusted by the Court when the one had been unintentionally enriched at the expense of the other. Frustration of contract was thus a by-product of a process directed to a different end. It seems to have been assumed, rather than asserted, that certain supervening changes in circumstances must necessarily sever the initial contractual tie, and attention was concentrated upon the substitute rights and obligations which on that event would emerge. It is necessary to refer briefly to the history of the law, not for its intrinsic interest but on account of its persisting influence upon later developments.

The idea of frustration was first foreshadowed in Scotland by Craig of Riccarton at the beginning of the 17th century[2] when he applied what is in essence the modern principle in an unexpected but revealing context—the forfeiture of a feu by a delinquent vassal—and justified his reasoning by invoking the Roman *condictio causa data causa non secuta* and *naturalis æquitas*. The same indirect approach was chosen by Stair in the famous passage[3] which was subjected to such close scrutiny in the *Cantiare San Rocco* appeal.[4] This passage occurs in a title devoted to the exposition of what Stair calls "the natural or

* This is the first of a series of articles on "Frustration of Contract" comparatively considered which will be published in this and the next number of the *Journal*.

[1] *Denny, Mott & Dickson* [1945] A.C. 265.

[2] *Jus Feudale.*, III. v. 23.

[3] *Inst.*, I. vii. 7.

[4] [1924] A.C. 226.

obediential obligation of restitution"; and one of the many cases to which he applies that obligation is where "the purpose contemplated has failed." It is in the same juridical context that the rules are formulated in embryo form by Bankton, Erskine and Bell.[5] In all these statements the underlying conception, which seems to have been taken for granted, was that the original contract obligations were extinguished by a species of novation and replaced by the substitute obligation of restitution, the occasion of the transformation being failure of the consideration, in the sense of the Roman *causa*.

Concurrently with this growth of legal theory a mass of decisions accumulated from the 17th century onwards dealing with the commonest type of supervening change of circumstance by which a contract can be rendered incapable of exact performance—the destruction, total or partial, actual or constructive, of some specific thing essential to its performance. These cases introduced into many chapters of our law a well-worn technical term, *rei interitus*. Associated with *rei interitus* in its proper sense was the parallel idea of the death or incapacity of the obligant in a contract involving *delectus personæ*. The concept of *rei interitus* was exhaustively worked out in relation to many different kinds of contract—lease, sale and *locatio operis* in particular—but the rules were not systematized as part of the general law of contract. Indeed, the tendency during the 18th century and even later was to examine such cases more from the standpoint of the law of property than from the standpoint of the law of contract. *Res perit domino* was the brocard to which appeal was often made; and when the early decisions were collected in Morison's *Dictionary* in 1801, the general heading under which he assembled most of them was "*Periculum*," for the question which the courts were in use to put to themselves was—on whom should the risk of this casualty fall ?[6]

It was around these two fruitful ideas—Restitution and *Rei Interitus*—that Scots Law had collected by the 19th century a large volume of opportunist doctrine mainly of Roman origin or inspiration. But little or no attempt had been made to rationalize the rules in a generalized theory, nor to correlate them to the principles of the law of contract. Even when Bell, the last of our institutional writers and the architect of our mercantile law, laid down his pen, he had only reached the stage of formulating one part of the doctrine in his general theory of contract by reference to the principle of *rei interitus*[7] and another part in a different portion of his work dealing with Restitution.[8] As Lord Macmillan has pointed out,[9] it is in the posthumous editions of the *Principles* that the doctrine first begins to assume its modern shape in the crisp formula that "when by the nature of the contract its performance depends . . . on the existence of a particular state of things, the failure . . . of that state of things liberates both parties." It is certainly to the credit of the editor that this generalization appeared so early as 1885, but it is a little odd that its theoretical justification was then found in an implied term of the contract.[10]

From this summary review it follows that well before the beginning of the present century the common law of Scotland had amassed most of the raw materials required for the construction of the modern doctrine of frustration, and that Scottish lawyers were habituated by long experience to the task of solving the consequential problems to which such an event gives rise. The question had been attacked upon a narrow front and from an unusual angle, and the effort had been directed to the practical issue of deciding specific cases rather than to the theoretical problem of integrating the solutions in a generalized

[5] *Bankton*, I. viii. 23; *Ersk. Inst.*, III. i. 10: *Bell Princs.*, s. 530.
[6] Cf. *Gloag on Contract*, 2nd ed. 351.
[7] *Princs.*, s. 29.
[8] *ibid.*, s. 530.
[9] [1944] A.C. at 272.
[10] 8th ed. by Sheriff Guthrie, s. 29.

system. But it is just such differences in method of approach and process of reasoning that impart to Comparative Law its peculiar value and help to explain the ultimate divergences in detail.

The distinctive features of Scots Law can best be examined by considering the ascertained and potential divergences from English Law; but the subject is obviously one for cautious handling, for the doctrine is still in process of development and the future course of judicial refinements cannot be predicted with certainty.

The outstanding instance is afforded by the rejection in Scotland of the rule in *Chandler* v. *Webster* that on the occurrence of frustration of a contract the loss lies where it falls. As we have seen, the Scottish solution of restitution goes back for centuries. It was justified by Lord President Inglis in a leading case in 1871,[11] and was authoritatively confirmed by the House of Lords in *Cantiare San Rocco* in 1924.[12] For nearly twenty years the two systems continued to part company in this respect until as a result of the *Fibrosa* case[13] restitution, or something very like it, became part of English Law. But the reconciliation was shortlived; for in the following year the Law Reform (Frustrated Contracts) Act was applied to contracts governed by English Law, and the English Courts were thereby empowered to effect sundry adjustments of the rights and liabilities of parties to a frustrated contract. From the *dicta* of certain of the Law Lords who decided the *Fibrosa* appeal it would seem that differing views were held as to whether similar adjustments could, where necessary, be made by Scottish Courts in applying the doctrine of restitution, the doubts arising from the limited terms of Lord President Inglis's formulation in *Watson* v. *Shankland*.[11] The point has never been decided. It was deliberately kept open by the terms of the interlocutor pronounced by the Court of Session in *Denny, Mott & Dickson*,[14] and it was not before the House of Lords in the appeal in that case. The opinion may be hazarded that the Scottish courts have all the requisite powers. It would surely be very odd if a doctrine, which is rooted and grounded in equity of the widest type and which has already displayed its remarkable adaptability, were incapable of the development required to enable it to deal equitably not only with the contingencies to which the Act of 1943 applies but also with many others which could be figured. It is significant, moreover, that the Act of 1943 was not applied to Scotland.

The mention of *Chandler* v. *Webster* suggests another possible point of difference between Scotland and England, viz.: whether " the Coronation cases " would be followed in Scotland in so far as they hold that the non-occurrence of an unexpected event *per se* frustrates any contract which is based on the assumption that the event will occur. The case of *Trevalion* v. *Blanche*[15] and the high authority of the late Professor Gloag[16] can be cited in support of the view that this is not in all circumstances Scots Law. Time alone will show.

The contrast between the Scottish and English methods of approach is further illustrated by the anxiety with which in some of the English cases attention is devoted to the characteristics of the " action for money had and received " and " the writ of *indebitatus assumpsit*." In the *Fibrosa* case, for instance, this bulked largely in the discussion. To a Scottish lawyer such considerations are not only irrelevant but positively distracting; for with us a right never depends on the existence of a remedy, but the remedy depends on the existence of a right. Of all the distinctions between the two systems this,

[11] *Watson & Co.* v. *Shankland*, 10 Macp. 142.
[12] [1924] A.C. 226.
[13] [1943] A.C. 32.
[14] 1943 S.C. at 316.
[15] 1919 S.C. 617.
[16] *Contract*, 2nd ed., 353-4.

as Lord Dunedin pithily observed,[17] is the one most difficult to bring home to a Scottish lawyer; and if we may judge from his Lordship's speech in *Sinclair* v. *Brougham*,[18] he did not find it any easier to bring the distinction home to his English colleagues.

In our latest book on Contract[19]—a work which has justly acquired the highest repute but which is no longer abreast of the latest developments—the attempt is made to divide contracts into those to which frustration is applicable and those to which it is not. Such a method of statement recalls the early stage in the history of frustration of contract when the doctrine had accidentally acquired a " definitely maritime flavour "[20] simply because its principal illustrations were in cases dealing with ships and charter-parties. It is doubtful whether Professor Gloag would have repeated that passage to-day; for the mature doctrine of frustration cannot be imprisoned within the formal categories into which contracts have been divided since the days of Gaius, and the question whether any given contract has been frustrated depends in Scotland upon whether the conditions of frustration have been satisfied, and not upon the particular species of the genus contract in regard to which the point arises. The pity is that in Scotland the individual cases raising the issue are neither numerous enough nor varied enough to admit of the full development of our native principles, and there is an ever-present risk that, with the much larger flow of English decisions, these native principles may be inadvertently forced into alien moulds, regardless of the resulting strains and distortions.

A conspicuous instance of a cleavage where this risk has so far been successfully averted is offered by the question of the applicability of frustration to a lease. In England this matter has come up in a number of decisions which Scottish lawyers found very troublesome; and these have now culminated in the *Cricklewood* appeal,[21] which discloses a sharp difference of judicial opinion based upon the fact that in England a lease is not only a contract but a demise of land creating a new estate. Such a distinction has no meaning in Scotland, whose law of heritable rights differs fundamentally from English real property law and does not recognize the doctrine of estates. It was in relation to leases that in Scotland the early developments of the concept of *rei interitus* found their principal illustrations, and the rule was soon settled that the accidental destruction of the subject of a lease, or its supervening sterility as a result of *damnum fatale*, liberates both landlord and tenant. Even more significant as a pointer to probable future expansions of the Scottish doctrine of frustration are the many decisions dealing with partial *rei interitus;* for the question was treated as one of degree to be solved by reference to the equitable rule of *plus quam tolerabile*, and it was early recognized that a tenant was normally entitled at least to an abatement of rent proportionate to the extent of his eviction.[22] Against such a doctrinal background it is easy to understand why in 1929 a Scottish court had no difficulty in holding that, where a fishery had been rendered incapable of beneficial possession as a result of Air Ministry bye-laws converting part of the area into a danger zone for bombing practice, the tenant was entitled to abandon the unexpired portion of a nineteen-year lease.[23] A like conclusion was reached during the recent war when a furnished house had been requisitioned by the military authorities and so rendered indefinitely unavailable to the tenant.[24] The best comments on these cases—and they have a much wider

[17] *Encycl. of Scots Law*, 1926, I. p. vi.
[18] [1914] A.C. 398.
[19] *Gloag on Contract*, 2nd ed., 357.
[20] *McNair, Legal Effects of War*, 1944, p. 142.
[21] [1945] A.C. 221.
[22] *Rankine on Leases*, 3rd ed., 225 ff.
[23] *Tay Salmon Fisheries* v. *Speedie*, 1929, S.C., 593.
[24] *Mackeson* v. *Boyd*, 1942, S.C., 56.

validity—were made by Lord Wright, who said: " The Scotch authorities afford no analogy applicable to English law, because they proceed, it seems, on a different view of the contract and of the legal background ";[25] and by Lord Normand, who spoke with greater emphasis: " In the chapter of leases, and I think also in the chapter of *rei interitus*, our law is by no means the same as the law of England, and, to quote Lord Justice-Clerk Hope, if we were to attempt to apply that law in these cases, we should run the greatest risk of spoiling our own by mistaking theirs."[26]

No inference can safely be drawn regarding the common law of Scotland from the terms of the emergency legislation passed at the outbreak of the recent war. For instance, the War Damage to Land (Scotland) Act, 1939,[27] conferred new powers on the Courts to modify, and even to cancel, leases, dispositions or heritable securities affecting subjects destroyed in whole or in part by war damage. It is thought that to a large extent such powers already existed; and it does not follow that they did not merely because Parliament saw fit in anticipation of an unprecedented situation to provide expressly and by a shorthand procedure for dealing with the emergency. It sometimes happens—*experto crede*—that an Act has to be applied to Scotland simply because a like Act has already been applied to England; and, as we have been reminded in the pages of this *Journal*,[28] Bills are nowadays made to pass as razors are made to sell.

To summarize, the principles of frustration now applied in Scotland harmonize in most essentials with those of Anglo-American Law. In the application of the doctrine to individual cases the different legal background of Scots Law has produced, and will yet produce, different results. Owing to its origin in Roman equity and its freedom from the restraints imposed by the history of English common law, Scots law in its application to this subject possesses a high degree of flexibility and adaptability, which may well lead to further incursions into areas closed to English rules.

It has not proved necessary for the Scottish Courts to join in the search for philosophic explanations of the principles of frustration such as has for long engaged the attention of so many eminent English judges and jurists. But it is of peculiar interest to the Scottish lawyer to note that the latest writer on this subject, after reviewing the bewildering assortment of suggestions offered to explain the foundations of the doctrine, concludes with Lord Wright that " the time has come to shed the fiction of implied contract and to regard the doctrine as a mode by which upon the facts of a case the court itself does justice in circumstances for which the parties never provided."[29] This in essence has been the Scottish view for more than three hundred years, and we need nothing better.

FRUSTRATION OF CONTRACT IN THE UNION OF SOUTH AFRICA

[*Contributed by* PROFESSOR R. W. LEE.]

THE theory of frustration of contract has followed much the same course in South Africa as in England. Only late in time and, as it were, by afterthought it became apparent that the civil law, too (from which the Law of South Africa is derived), had a theory of its own, and even now it cannot be said that this belated discovery has made a deep impression upon the system, though it has affected the point of view.

[25] [1945] A.C. at 239.
[26] 1942, S.C. at 63.
[27] 2 & 3 Geo. 6. ch. 80.
[28] 3rd series, vol. xxviii, p. xxvi.
[29] *Webber, Effect of War on Contracts*, 2nd ed., 414.

The earliest case which calls for notice is *Norden* v. *Shaw*,[1] decided in 1847. Action was brought for breach of a contract to deliver "Kafir" gum in terms of a contract of sale. The defendant pleaded that owing to the Kafir war he was "entirely prevented from completing the said contract." He tendered as damages for breach of contract the sum of £50, which plaintiff refused to accept. The Court held that although the defendant had been prevented from delivering the gum solely by the Kafir hostilities, that fact did not afford a defence against the plaintiff's claim for damages. Judgment was given for the plaintiff for £200. The Attorney General for the plaintiff, referred to a note in *Campbell's Reports*, vol. II, at p. 58. This is the only authority cited.

Some thirty years elapsed before another Kafir war was the occasion of the decision in *Hay* v. *The Divisional Council of King William's Town*.[2] A mail contractor claimed damages from the Council for injuries sustained by his postcart, whilst carrying Her Majesty's Mails, through the insufficient repair of a public highway, which it was the duty of the defendants to keep in repair. The Council pleaded in effect that at the time of the alleged injuries hostilities were being carried on between the Government of the Colony and certain frontier tribes which rendered it impossible to keep the road in proper repair, but that they did all that they were required to do by law under the circumstances. The plaintiff excepted to this plea as affording no defence to the action. The Court (Barry J., Smith J.) decided in favour of the defendants upon the ground of the distinction taken in *Paradine* v. *Jane*[3] and adopted in *Hadley* v. *Clarke*,[4] viz., that "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This point was not taken by counsel for the defence, who set up an inadmissible analogy between hire and sale. Dealing with this Barry J. said: "While . . . the Roman-Dutch Law enables the tenant to escape payment of rent where he has been deprived of his beneficial occupation by war[5] . . . I see no reason for importing such implied conditions into other contracts not affected by similar presumptions of law. Had, therefore, the obligation in this case been one implied by contract similar to that existing between *Norden* and *Shaw* I should have allowed the exception. But the usual law in cases of *contract* is not applicable to this case."

Both the learned judges freely cite the decisions of the English courts which "establish that if a man by lawful contract, unconditionally and absolutely undertakes to do an act not impossible at the time of contract, he cannot excuse himself by an inevitable act, or by *vis major*, not foreseen by him or within his control."

That this rule, however, is not absolutely inflexible appears from a citation by Barry J. from the judgment of the Court of Queen's Bench delivered by Hannen J. in *Baily* v. *De Crespigny*.[6] The same influence is apparent in the Natal case of *Morgan & Ramsay* v. *Cornelius & Hollis*,[7] decided in 1910.

[1] 2 Menz. 158. The Reports of Mr. Justice Menzies in three volumes record cases which came before the Supreme Court of the Colony of the Cape of Good Hope, of which he was senior puisne Judge, in the years 1820-1850. Though intended for publication they were not in fact published until twenty years after his death. They are held in great esteem, but have not the formal perfection of reports prepared for contemporary publication.

[2] (1880) 1 E.D.C. 97.

[3] (1647) Aleyn 26.

[4] (1799) 8 T.R. 259.

[5] Voet, 19. 2. 24.

[6] (1869) L.R. 4 Q.B. 180.

[7] [1910] N.P.D. 447.

When the Union of South Africa came into existence on May 31, 1910, the Appellate Division of the Supreme Court was constituted a Court of Appeal from the Supreme Courts of the four colonies now provinces of the Union. We shall have occasion to comment on some of the decisions of this august tribunal, which is in practice, if not in law, a court of ultimate resort. The first case which calls for attention is *Algoa Milling Co. Ltd.* v. *Arkell & Douglas* [1918] A.D. 145. Defendant (Appellant) at Port Elizabeth offered to buy from Plaintiffs (Respondents), a New York firm, 16,000 bushels Manitoba wheat—shipment July at 14s. per 100 lb. Plaintiffs accepted by letter which repeated the terms of the offer with an added marginal note, " Contingent upon strikes, floods, riots, war, rebellion and all other contingencies." In the Court of first instance—the Cape Provincial Division—Judge President Kotzé held on the evidence that the marginal note formed part of the contract between the parties; and the Appellate Division had no doubt that the time of shipment was, as in *Bowes* v. *Shand* (2 A.C. 455), of the essence of the contract. In the event, the wheat was shipped from Montreal on August 18, reached Port Elizabeth in due course and was tendered to the defendant company, which refused to accept it. Thereafter, it was sold locally at a loss of £842, which sum the plaintiffs sought to recover. Defendant pleaded failure to deliver in terms of the contract. The Appellate Division agreed with the lower Court in holding that the contract between the parties was subject to the condition contained in the margin of plaintiffs' letter. " Then comes the question whether the failure to ship in July was due to unavoidable contingencies beyond the control of the sellers. . . . The trial Court answered the question in the affirmative, being of opinion that the delay in shipment was due to shortage of tonnage consequent upon the war and to the difficulty of obtaining freight arising from circumstances unavoidable and beyond the control of the respondents. With that finding I entirely agree " (Innes C.J., at p. 155). . . . " Time being essential here, the sellers can no more claim to enforce the contract when they have been unable to ship in time than they would have been entitled to do so if they had been unable to supply the specific description of wheat. The failure of timeous shipment being covered by the marginal condition, [the sellers] would be protected against any action for breach by the buyers; but beyond that its operation does not extend " (p. 159). The other members of the Court (Solomon J.A., Maasdorp J.A.) delivered judgments to the same effect with the result that on the main issue, reversing the judgment of the lower Court, judgment was entered for the defendants.

Since the plaintiffs were exonerated from liability by the express reservation in the contract the question of the effect of supervening impossibility not expressly provided for did not come in question. But Maasdorp J.A. took occasion to refer to it at length: " The rule in *Hadley* v. *Clarke* (he said) was adopted in *Norden* v. *Shaw* and approved in *Hay* v. *The Divisional Council of King William's Town* " and " there is nothing in our authorities which is inconsistent with this rule."

It is clear that the learned judge's lengthy *obiter dictum* adds nothing to what had been said in the last-named case about forty years earlier. It is equally conspicuous for reliance on English cases and inattention to the treatment of the topic in the civil law.

The next year brought a change. In *Peters, Hamman & Co.* v. *Kokstad Municipality,* [1919] A.D. 427, the facts were as follows. Peters, Hamman & Co., defendants in the Court below, contracted with the Municipality to light the town of Kokstad with acetylene gas for a period of years. Whilst the contract had several years to run the directors of the company were interned as enemy subjects and the business was wound up by an officer employed by the Treasury, who began by cutting off the supply of light. The Municipality

joined him as defendant in an action brought against the company for breach of contract.

Solomon A.C.J., in the course of his judgment said (p. 434): "By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D. 50. 17. 185). So also where a contract has become impossible of performance after it had been entered into the general rule was that the position was then the same as if it had been impossible from the beginning: *etsi placeat extingui obligationem si in eum casum incideret a quo incipere non potest* (D. 45. 1. 140. 2). . . . It is true that there are exceptions to the general rule laid down in the *lex* of the Digest cited above, which concludes thus: *Non tamen hoc in omnibus verum est.* For the purposes of this appeal, however, it is not necessary to discuss the exceptions. . . . Nor is it necessary to consider generally what are the circumstances in which it can be said that a contract has become impossible of performance. For the authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitus,* under which would be included such an Act of State as we are concerned with in this appeal, he is discharged from liability.

"Unfortunately" (His Lordship continued) "the rules of the Civil Law appear to have been ignored in several cases on this subject which have come before our Courts, which have been guided entirely by the decisions of the English Courts. Thus in *Hay* v. *Divisional Council of King William's Town,* Smith J. quoted with approval the law as laid down in *Paradine* v. *Jane* . . . [But (p. 436) this rule] is not consistent with the principles of the Civil Law, and indeed it has been considerably modified by later English decisions (*Horlock* v. *Beal,* [1916] 1 A.C. 523; *Tamplin S.S. Co.* v. *Anglo-Mexican Products Co. Ltd.,* [1916] 2 A.C. 422)" (p. 437). "It will be seen, therefore, that although the English law looks at the subject from a different point of view from ours, in the result the difference between the two systems is not very great."

The next case which calls for notice did not get further than the Cape Provincial Division (*Schlengemann* v. *Meyer, Bridgens & Co. Ltd.* [1920] C.P.D. 494). Plaintiff was a managing director in defendant company. On the outbreak of war in 1914 he was interned as an enemy subject and afterwards released on condition of residing at a certain place, not being the place where the Company carried on business. At the end of the war he sued the Company for reinstatement as managing director.

Gardener J. said (p. 500): "Defendants *inter alia* set up the contention that the contract . . . owing to [plaintiff's] internment and absence from business has come to an end. Now, according to our law impossibility of performance, even when it arises after the conclusion of a contract dissolves the contract as Mr. Justice Solomon says in the case of *Peters, Hamman & Co.* v. *Kokstad Municipality* [*supra*] . . . The difficulty which arises is in finding what is impossibility of performance and what is suspension of performance. No authorities have been cited on our law to show how this distinction is to be drawn. The English cases and principles, it seems to me, must apply to the matter, for they are principles not specially applicable to English law, but principles which must be at the root of any contract." The learned judge referred to the observations of Earl Loreburn, L.C., in *Tamplin* (*F.A.*) *Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.,*[8] and of Rowlatt J. in *Distington Hematite Iron Co. Ltd.* v. *Possehl & Co.,*[9] and to other English cases and continued (p. 502), "Applying these principles it seems to me that we have to look and find out upon what footing was the agreement entered into between Schlengemann and the Company. It seems quite clear that it

[8] [1916] A.C. at pp. 403, 404.
[9] [1916] 1 K.B. 811.

was made on the footing that there should be a continuous giving of personal services" (p. 504). "The service was impossible and the defendants were entitled to treat the contract as at an end."

The case was very fully argued, but from beginning to end there is no reference to any civil law authority.

The question of supervening impossibility did not arise in *African Realty Trust Ltd.* v. *Holmes,* [1922] A.D. 389, for the event which occurred was covered by the contract, but de Villiers J.A. took occasion to deal with it:

"There is authority for the proposition that when the basis of a contract falls away the contract falls away with it (Coronation cases). . . . Blackburn J., who was steeped in the civil law, in deciding the case of *Taylor* v. *Caldwell,* the destruction by fire of a music hall which had been let, applied the authorities relating to the perishing of a *res* (D. 41. 1. 33 and 23; Pothier, *Traité des Obl.,* Part 3, c. 6, art. 3, s. 668). But there was no occasion to extend this doctrine by analogy to the non-happening of a future event contemplated by the parties, such as the Coronation procession, for the civil law contains ample authority besides on implied conditions (D. 2. 14. 4, 2, etc.). . . . Professor R. Leonhard deals with the matter in *Der Irrthum bei nichtigen Verträgen nach Romischem Rechte, Anno,* 1882. At p. 261 he discusses a contract by which a person hires a room for a day on which a procession is expected to take place in a city, and comes to the conclusion that the contract was entered into under the unambiguous condition that the procession should take place, although it contained nothing more than that a certain room is hired at a certain price for a definite date.

The question of impossibility of performance came up again in *MacDuff & Co.* v. *Johannesburg Consolidated Investment Co. Ltd.,* [1924] A.D. 573. There was an arrangement between the two companies that the plaintiff company should go into liquidation and that all its undertakings and assets should be transferred to a new company to be floated by the defendant company. The defendant company having failed to carry out its part of the arrangement the plaintiff company (in liquidation) brought this action for breach of contract.

Solomon A.J. said (p. 602): "It was contended in argument that in law a contract becomes impossible of performance when the parties make a bargain on the footing that a particular state of things will continue to exist and where there has been a discontinuance of that state of things such as to upset altogether the purpose of the contract (Lord Loreburn L.C. in *Tamplin S.S. Co.* v. *Anglo-American Petroleum Products Co. Ltd., ubi supra*). . . . The principle was accepted in the case of *Schlengemann* v. *Meyer, Bridgens & Co.* (*supra*) and for the purposes of my judgment I shall assume it to be good law" [p. 605]. "That from a business point of view it would have been bad policy to form such a company is clear, but is that in itself sufficient to discharge the defendant company from fulfilling its obligation?" In the case of *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co.,* [1917] A.C., at p. 510, Lord Loreburn says:

"The argument that a man can be excused from performance when it becomes "commercially" impossible, which is forcibly criticized by Pickford L.J.,[10] seems to me a dangerous contention which ought not to be admitted unless the parties have plainly contracted to that effect." There would no doubt have been heavy loss to the defendant company if it had fulfilled its obligation under the agreement, but that in itself is not a sufficient ground for discharging it from its contract."

One more case invites attention. It has the merit of presenting clearly in the judgment of Stratford J. the fundamental difference between the common law and the civil law approach to the subject of frustration. It serves also as a summary of the whole question. It is *Hersman* v. *Shapiro & Co.* in the

[10] *Wilson & Co. Ltd.* v. *Tennants (Lancashire) Ltd.* [1917] 1 K.B. at p. 218.

Transvaal Provincial Division ([1926] T.P.D. 367), in which action was brought for damages for failure to deliver corn as per contract. The defence was impossibility owing to supervening failure of crop.

The learned Judge after referring to the judgment of Solomon J. in *Peters, Hamman & Co.* v. *Kokstad Municipality* (*supra*) continued:

" A careful perusal of the judgment leads me to think that the learned Judge never meant to say that the defence of impossibility of performance is so absolute as to override the terms or the implications of the contract in regard to which the defence is invoked. It seems to me obvious, from the semi-approval which was given to the English cases, that the learned Judge always had in mind that a contract in respect of which a dispute arises and its implications must always be given due weight to. That is what I think he means when he says, ' It will be seen therefore that though the English law looks at the subject from a different point of view from ours, in the result the difference between the two systems is not very great.' If I supposed the difference to be so radical that in our law the impossibility of performance is an unqualified and absolute defence in all cases and that in English law, as these cases show, you look entirely at the contract, to see what the implications of that contract are—if that were the distinction between the two systems of law—then far from there being, as the learned Judge says, very little difference between the two systems, there would be all the difference in the world. It is clear to me, therefore, that the difference between the two systems really is this, that in our law you look to the rule in the Civil Law as quoted by his Lordship in this case, and then to the contract, to see how that rule should be applied in regard to the specific facts of the particular contract involved, whereas in English law you start with the contract and remain with the contract throughout, looking entirely and solely at it to see what the effect of any supervening conditions should be in law. That is what Lord Parker said when he used the words which are quoted in this judgment, namely: ' This principle is one of contract law, depending upon some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end,'[11] and when Lord Loreburn said: ' An examination of the decisions confirms me in the view that, when our Courts have held innocent parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise.'[12] Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the causes of the impossibility, because those causes might be in the contemplation of the parties; or again they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification.

" Therefore the rule that I propose to apply in the present case is the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and that we must look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether that general rule ought, in the particular circumstances of the case to be applied. With that view of the law, I turn now to examine the nature of the contract which we have here."

[11] *Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. at p. 422.

[12] *Ibid.* at p. 403.

The learned Judge went on to say that neither of the parties was a consumer or producer of corn. Both were merchants or dealers in corn.

[p. 374.] "Looking at the nature of the contract—that it was of a speculative character and both parties ran whatever commercial risk resulted from a rise or fall of the market against them—I cannot think that the condition of things that has happened is not a condition of things that might well have been within the contemplation of the parties. Therefore on the particular facts of this case I am prepared to go the length of saying that looking at all the circumstances surrounding the making and performing of this contract the implication of the contract is that the defendant shall not be relieved because of a failure of crops in the Union. And, if that is the right implication to draw from the facts and circumstances of these contracts, then that disposes of the defence of impossibility of performance."

This concludes our survey. It does not appear that any later cases relevant to this enquiry worth mention have come before the Courts either before the latest war or, so far, in consequence of it.

FRUSTRATION OF CONTRACT IN FRENCH LAW

[*Contributed by* PROFESSOR RENÉ DAVID, *Paris*.]

1. ALTHOUGH it sounds like a French word, the word "frustration" does not exist in the French language. The word "frustration" is English only, and so is the legal doctrine of frustration. No French lawyer would understand without a study of English law what is meant by the doctrine of frustration of contract. French lawyers must resort to other doctrines, based on other ideas than the idea of frustration, if it is desired in France to give effect to the conceptions of natural justice which find expression in England in the doctrine of frustration.

2. The doctrine of frustration in England is entirely different from the question of the right which accrues to one party to rescind a contract when certain kinds of breaches have been committed by the other party. It is also, at least theoretically, distinct from the doctrine of impossibility of performance, although there is a certain amount of confusion between the two doctrines.

The true object of the doctrine of frustration, as distinct from the doctrine of impossibility of performance, is to deal with the following situation; a contract has been made, and circumstances supervene, the effect of which is to upset the very foundations of this contract, in such a way that the contract which could eventually be performed would be in fact different from the contract originally contemplated by the parties. What consequences will be inferred by the law from such a change of circumstances ?

3. There is in France a general doctrine of *force majeure* which deals with the case of impossibility of performance. This doctrine is dealt with by Articles 1147 and 1148 of the Code civil. It applies to all sorts of contracts, including the contracts known as *contrats administratifs*, concluded between the State or a public corporation and a private person. It is necessary to summarize the scope and the rules of this doctrine, for it applies to some cases which are considered in England as being dependent upon the doctrine of frustration of contract.

According to the doctrine of *force majeure*, a contract will be rescinded in French law, and no liability will be incurred by a party to it for the non-performance by such party of his obligations under the contract, if the courts are satisfied that it has become impossible to perform the contract, by reason of an event which could not have been reasonably foreseen by the parties at the time when the contract was entered into. Performance of the contract must be

absolutely impossible, and must not merely be more onerous for a party, in order to constitute *force majeure*.

Cases where the doctrine has been held to apply are of two kinds:—

(*a*) Cases of *legal* impossibility, where the impossibility to perform the contract arises from a supervening change in the law or a governmental decree or a Statute (known as *fait du prince*) which forbids a party to perform, or prevents him from performing, his obligations under the contract. Such cases appear to be in England within the province of the doctrine of frustration. An Act of Parliament, for instance, forbids the exportation of goods, which a seller has undertaken to deliver out of France. A house or a flat is requisitioned in time of war by the authority of Government, which prevents a lessee from entering and occupying the premises.

(*b*) Cases of *physical* impossibility, where the performance of the contract is materially impossible, by reason either of the loss of the goods (without the fault of a party), or of an act of God or of an act of the enemy (requisition, stoppage of all transports), which absolutely prevents the contract from being executed.

When such impossibility arises without the fault of a party, and the event which creates the impossibility could not reasonably have been foreseen by the parties at the time of the contract, the doctrine of *force majeure* will apply. The contract will be treated as a nullity, parties will be discharged from their obligations to carry out the contract further, and acts of performance done before the *force majeure* occurred will be annulled as far as possible. French legal writers consider the doctrine of impossibility of performance and *force majeure* as being related to the *théorie de la cause;* it is, however, technically, entirely distinct from the doctrine of unjust enrichment (*enrichissement sans cause*).

4. The doctrine of *force majeure* was until 1914 the only one to which French courts and legal authors could resort in order to discharge a party from his obligations under a contract, should new circumstances arise after the making of the contract. The French courts were intent to safeguard the principle of sanctity of contract (*Pacta sunt servanda*), and it was very difficult to satisfy them that there was a case of *force majeure*. The sole fact of a war or a strike or a riot or plundering, for instance, has constantly been held not to be *ipso facto* a case of *force majeure;* the special circumstances of the case must always be investigated in order to determine whether such events could not have been reasonably foreseen by the parties and whether they have given rise to an absolute impossibility to perform the contract.

Owing to the circumstances incident to the first World War, and owing specially to the fall of the French currency after that war, a tendency showed itself in France, after 1914, to extend the notion of *force majeure* and to put an end to contracts even in cases where no absolute impossibility to perform had supervened, but when performance of the contract would have been much more onerous for a party than could reasonably have been foreseen at the time of the contract. A new doctrine, known as *théorie de l'imprévision,* has been asserted to that end by some French legal authors, and submitted by them to the courts. Two points were stressed in support of such theory: (1) According to French law a contract must always be interpreted and construed in accordance with the intention of the parties thereto. A condition *rebus sic stantibus* ought therefore to be read into all contracts, it was asserted, as an implied condition stipulated by the parties; (2) According to Article 1134 of the Code civil, contracts must be performed *bona fide*. This provision of the Code civil, it was also asserted, might help to support the doctrine of *imprévision*.

The doctrine of *imprévision* appears to be different from the English doctrine of frustration, just as the French theory of interpretation of contracts is different from the English rules of construction of contracts. The English doctrine of frustration is based on the idea that a contract must come to an end when it

becomes by itself a different contract from the one which the parties had contemplated; the French doctrine of *imprévision,* on the other hand, purports to be based, essentially, on an interpretation of the will of the parties to the contract.

5. The doctrine of *imprévision,* however, has never been admitted by the hierarchy of civil and commercial courts, at the top of which is the Court of Cassation. These courts have always held firmly to the principle of sanctity of contracts, and they have always refused to intervene in favour of a party to a contract when there lay no case of a *force majeure.* The Cour de Cassation, which adjudicates only on points of law, has extended its control over the decisions of other courts in order to prevent such courts from developing the law in such a manner as to admit *imprévision,* by way of an interpretation of individual contracts. Although the question, whether an implied condition *rebus sic stantibus* can be read in a contract, would appear to be a simple question of fact, for the decision of which the finding of the lower courts would be final, the Cour de Cassation has always considered that it should exercise its control, and that there was a question of law because the courts are not qualified to impose on the parties a contract different from the one which they had contemplated. The Court of Cassation, on the other hand, always exercised its control on the point whether an actual and absolute impossibility to perform had been created by the events supervening and whether such events therefore amounted to a *force majeure.*

6. The doctrine of *imprévision,* which has been rejected by the civil and commercial courts and by the Court of Cassation of France, has been admitted on the contrary, in a number of cases, by the *tribunaux administratifs* of France, and especially by the *Conseil d'Etat,* which is not bound by the Code civil, and which gives its decisions according to the rules of *droit administratif.*

In the case of contracts entered into by the State (or some other public body) and a private person, when a public interest is closely concerned, the *Conseil d'Etat* allows a party to apply for relief when new circumstances have arisen, the effect of which is to make the performance of the contract much more onerous for such party. The public body will be compelled in this case either to assent to a modification of the contract or to pay a sum of money to the other party, by way of an indemnity, in order to enable him further to perform his obligations under the contract with a reasonable margin of profit in the new circumstances which have arisen. Such remedy, however, will not be granted in all cases, but only in the case of continuous contracts, when the other party has undertaken to make acts of performance of the contract for a term of many years.

The general interest of the public welfare is the *ultima ratio* that induces this attitude of the *tribunaux administratifs,* which decide cases according to "reason" and to precedents much in the same way as English judges must have adjudicated cases at the dawn of the common law. The interpretation and effects of contracts in which a public body is involved, are not governed in France by the rules of *droit civil,* but are held to be a matter of *droit administratif,* where special circumstances ought to be taken into consideration. Note also that *droit administratif* is a branch of public law, and that the clause *rebus sic stantibus* forms an important part of international law, which is another branch of public law.

7. The severity of the civil and commercial courts in refusing to admit the doctrine of *imprévision* has not been relaxed. Several reasons must nevertheless be mentioned which make it less hard than it appears or may have been initially.

First of all, we have unfortunately become accustomed in France, since 1914, to drastic changes of circumstances. It has become customary, therefore, in contracts made after 1914 for a long term of years to provide a remedy for the case of a change of circumstances. The clause *rebus sic stantibus,* in other

words, has been expressly inserted in contracts, and various means have been devised in order to modify the clauses of a contract, should circumstances make a revision of the contract desirable. This also applies to the case of contracts ruled by *droit administratif;* the number of cases, therefore, in which the doctrine of *imprévision* will be applied, even by *tribunaux administratifs,* is steadily declining.

Secondly, many commercial contracts contain in France a clause of submission to arbitration, which gives to the arbitrators the powers of *amiables compositeurs.* In this case arbitrators will be authorized according to French law to disregard rules of law and will be allowed to settle the case according to their conception of natural justice; they may of course do this by considering the change that has occurred in the attendant circumstances. It must be pointed out, nevertheless, that this does not commonly happen: amiable composition is stipulated in France, as a rule, not in order to allow, and still less to encourage, arbitrators to disregard rules of law, but essentially in order that their award should be final and that no appeal should be possible to the courts on the merits of such award.

Thirdly, measures have been taken in a number of cases by Parliament to provide remedies for parties to contracts who suffer from supervening changes of circumstances in the country. First of these measures was a statute of 1918, known as the *loi Failliot,* which provided for the revision of a number of contracts entered into before the war. Numerous laws have since been passed, authorizing the revision or cancellation of various classes of contracts (especially between landlords and tenants, or between the vendors and purchasers of *fonds de commerce,* or in favour of persons threatened by the anti-Jewish policy of Nazi-ruled France, etc.). It will also be necessary to record, amongst these laws, the laws regulating conditions of labour, which provide for a possible revision of collective contracts entered into between employers and workers to establish scales of salaries and other agreements.

8. It must also, finally, be pointed out that the rules mentioned above, and the strictness of the French Courts, apply to a time when the doctrine of freedom of contracts prevailed in French law. It is quite certain that the principles which have hitherto obtained in French law must give way to other rules if France is going to live under a regime of *économie dirigée* and if contracts are to be considered in the future as a matter affecting not only private interests, but also, and primarily, national interests and public policy. This has happened in the case of many contracts in France since the outbreak of the war of 1939, owing to the pressure of circumstances. Products were very scarce, and contracts affecting most kinds of goods could only be entered into according to conditions set in advance by regulations issued by the administration or by certain corporative bodies; it is clear that such bodies, which could control the conditions of a contract at the time when it was made, were equally competent to impose afterwards a modification of these conditions. As in the case of contracts governed by *droit administratif,* a doctrine of *imprévision,* ruled by administrative discretion and not by judicial authority, has thus obtained in France, by reason of these special war conditions, since 1939. The future of what amounts to the French parallel to the doctrine of frustration will inevitably be affected by the future economic and social conditions prevailing in France.

9. Literature: Colin et Capitant, *Cours élémentaire de droit civil français, t. II.* (9e *éd.*, 1942), *Nos.* 125, 130; Planiol et Ripert, *Traité élémentaire de droit civil, t. II.* (*éd.*, 1943), *Nos.* 461, 719; Waline, *Manuel élémentaire de droit administratif* (4e *éd.*, 1946), *pp.* 340, 414, 483, 533; *Travaux de la Semaine internationale de droit* (*Paris*, 1937, *Société de legislation comparée*), *t. II.: la révision des contrats par le juge;* Jéze, *Cours de droit public*, 1932–1933 (*Théorie générale des contrats de l'administration: Exécution*).

FRUSTRATION OF CONTRACT IN GERMAN LAW

[*Contributed by* E. J. Cohn, Ph.D., Dr. Jur., *Barrister-at- Law.*]

It is a truism that the fate of a nation is mirrored in its law. During the last 32 years Germany has gone through the first world war, the revolution of 1918, the inflation of 1919-1923, the deflation from 1929-1933, the Nazi revolution of 1933, the period of war preparations from 1933 to 1939, the second world war, the occupation by Allied troops and finally the division of the country into four—or, if the zone under Polish " administration " is included, into five—zones of occupation. Such a series of events could not fail to render the problem of frustration of contracts vitally important. The bewildering variety of these events resulted in many currents and cross-currents of developments and opinions. These can be understood only through a study of the historical development of the problem. In the space available here only the bare outlines can be traced. Even these are sufficiently bewildering to readers who have the good fortune to live in a world in which the margin of certainty is still very much larger than it has been in Germany since 1914.

A. Impossibility of Performance in the Civil Code.—In Germany it has long been generally believed that the problem of frustration was identical with that of impossibility (*Unmöglichkeit*) of performance. That this belief was possible, was due to the thoroughness with which the Civil Code seemed to have treated this topic. Following the Roman Law the code held that initial impossibility renders the contract void.[1] " Impossibilium non est obligatio."[2] Initial impossibility exists, however, only where nobody can perform.[3] If performance is impossible for the debtor only, the contract is fully valid. Initial personal inability (*Unvermögen*) to perform is no excuse.[4] In such cases the debtor is liable in damages. In the case of supervening impossibility different rules apply. Supervening impossibility automatically discharges the debtor, provided he is not responsible for it, no matter whether performance is impossible for him alone or for everybody. On the other hand, supervening impossibility is considered as a breach of contract rendering the debtor liable in damages, if he is responsible for it.[5] Responsibility is defined as either bad intention or negligence on the part of the debtor or of those for whom he is vicariously responsible. Thus the doctrine of impossibility is linked up with that of breach of contract. One important restriction is made: if the debtor has promised delivery of things defined by their kind only, performance is not impossible as long as delivery of things of this kind is still possible.[6]

The Code had devoted special attention to the question of the consideration given or to be given for the performance which had become impossible.[7] Following a doctrine developed during the period of the *usus modernus pandectarum* the Code distinguished between ordinary and reciprocal contracts (*gegenseitige Verträge*). The latter are contracts where the promises made by the parties stand to each other in a relation of reciprocity, as, for example, in the case of a contract of sale the promise to deliver the goods sold and the

[1] S. 306. For a concise statement in English of the German law relating to impossibility of performance, as it stood before the first world war, reference is made to Schuster, *Principles of German Civil Law* (1907), pp. 167ff. See also, Gottschalk, *Impossibility of Performance in Contract* (1938), pp. 128ff.

[2] D. 50, 17, 185 (Celsius).

[3] This doctrine, accepted by a number of Continental Laws, has been severely criticized by several influential writers, see Rabel, *Der Warenkauf*, vol. V. (1936), pp. 122, with further references.

[4] S. 306 does not mention " Unvermoegen." On the other hand, s. 275 (2) states expressly that supervening " Unvermoegen " has the same legal consequence as supervening " Unmoeglichkeit."

[5] S. 276ff.

[6] S. 279.

[7] S. 323ff.

promise to pay the price. In an ordinary contract no such reciprocity exists; where X has received a loan from B he is bound to pay interest and repay the capital: there is no reciprocal counter-promise on the part of the other party. If in a reciprocal contract performance becomes impossible for one party, without that party being responsible for the impossibility, the other party is automatically discharged from the duty of rendering consideration. Where consideration has already been given, its value may be recovered in so far as the recipient is still enriched. Where performance has only partly become impossible, the duty to render consideration is proportionally reduced. These rules do, however, not apply in a number of cases in which special provisions deal with the consequences of an accidental destruction of the corporeal object whose letting or delivery forms the subject-matter of the obligation. Among these special provisions are those which relate to the passing of risk in respect of goods sold.[8]

B. The Definition of Impossibility in the Period before the First World War.—The most conspicuous deficiency of this system is the lack of a definition of impossibility. Already among the pre-war commentators it was generally recognized that impossibility in the legal sense was not the same as impossibility in the logical, technical or philosophical sense.[9] In the first instance the law regards a performance that is legally prohibited as "impossible," though it might physically still be impossible. In the second instance the commentators, following a number of nineteenth century writers, held that something that appears as impossible to ordinary business common sense must be considered as impossible in the legal sense, though by the standards of the mechanical and other sciences it might still be possible. Thus if A had sold a ring to B and the ring falls into the sea, performance of A's promise has become legally impossible. That an army of divers might rescue it, is irrelevant. This doctrine was obviously capable of expansion. But the earlier authorities were not inclined to make use of this possibility.

The first successful attempt to widen the traditional conception of impossibility came from another direction. If performance was as such still possible, but not possible at the time and place where it had been promised, could the statutory rules of impossibility be applied? This problem had engaged the attention of the Supreme Court already twice before the Code came into force. In both cases[10] the debtors had promised delivery of specified flour from a mill. The mill was subsequently destroyed by fire. In consequence delivery could not be made earlier than from six to eight months after the time when it

[8] S. 446. The BGB has replaced the curious Roman rule "periculum est emptoris" by the rule that the risk passes on delivery only.

See on the law of the *usus modernus* as finally developed before the coming into force of the Code Windscheid, *Pandekten* (vol. 2, 8th ed., by *Kipp*, 1900), ss. 264 and 315, Dernburg, *Pandekten*, vol, 2 (1885), pp. 44ff., Sintenis, *Practisches Gemeines Zivilrecht*, vol. 2 (1868), pp. 24ff. and 471ff., Baron, *Pandekten*, 8th ed. (1893), pp. 356ff., and 424ff. Prussian law did not deviate much from the Roman common law, the main difference being that in Roman law an obligation was void if performance was impossible at the time when the obligation came into existence (*Inst.* 19, 3, 2, Windscheid, s. 315, note 11), while according to Prussian law the validity of the promise depended upon whether its performance was possible at the time when it was due (see Dernburg, *Preussisches Privatrecht*, vol. 2 (3rd ed., 1882), p. 53. The BGB accepted the Roman solution with a modification in favour of contracts concluded on condition that performance should become possible after the conclusion of the contract, BGB, s. 308, and see D. 18, 1, 34, 2 (Paulus).

[9] See on the following Titze, *Unmoeglichkeit der Leistung* (1900), pp. 9ff., Endemann, *Lehrbuch des buergerlichen Rechts*, 9th ed. (1903), vol. 1., pp. 692ff., Kisch, *Nachtraegliche Unmoeglichkeit bei gegenseitigen Vertraegen* (1900), pp. 2ff., Kuhlenbeck, in Staudinger, *Kommentar zum BGB*, 7/8 ed. (1912), note I, 1 before s. 275, Rehbein, *Das Buergerliche Gesetzbuch mit Erlaeuterungen*, vol. 2 (1903), pp. 110ff.

[10] *Reichsgericht in Entscheidungen in Zivilsachen* (abbreviated hereafter; RGZ), vol. 42, p. 115, and in Seuffert's *Archiv*, vol. 45, p. 282. See on these and older decisions Rehbein, l.c., p. 111.

should have taken place. The Supreme Court decided that this was not a case of mere delay of performance but one of impossibility, because " in consequence of the delay the meaning of the performance had become essentially different." The economic essence of what could still be done was different from the act that was agreed to be done. The old conceptions of essence and difference, developed by the Stoa, still haunt the scene.[11] Their function in the present case was to keep within very narrow limits the operation of the doctrine of impossibility.

A number of writers considered these limits too narrow. In their view the conception of impossibility had to be given a more elastic meaning. It was to be understood in an economic sense. Any performance that was economically so difficult that it could not in fairness be demanded of the debtor, was in their view impossible, because it was " outside the range of the debtor's obligations."[12] The Reichsgericht had already toyed with these ideas in a case arising before the first world war.[13] In that case the debtor had promised delivery of goods, defined by their kind i.e., of a type of flour which was produced in one mill only. This mill, like those in the other two cases referred to before, was destroyed by fire. But a few hours before the fire broke out, 2,000 tons of flour had left the mill. These 2,000 tons of flour were in existence somewhere. In the plaintiff's view that meant that performance was still possible, however difficult it might be to locate their present whereabouts and to purchase them from those who had bought them. The Court disagreed with this proposition. To locate and purchase these stocks was so difficult that the law had to treat performance as impossible.

Opponents of the theory of economic impossibility soon drew attention to its weaknesses.[14] Impossibility results in automatic discharge. That is an unsuitable solution in this type of case, because of the vagueness of the conception of economic impossibility and because a debtor might have good reasons for desiring to perform notwithstanding even enormous difficulties. The opponents believed that they could find a more satisfactory solution in section 242 BGB according to which the debtor was only bound to perform " in such manner as good faith between the parties requires, due regard being had to ordinary usage." In their view economic impossibility was not legal impossibility. The contract was not discharged. But the debtor had a right to refuse performance. The disadvantages of this view were twofold: it failed to provide a clear basis for a decision on the fate of the consideration to be given by the other side, and it gave no clear direction on the all-important question when the debtor could refuse to perform. S. 242, even more than public policy, is an " unruly horse." No wonder that the Courts hesitated long before mounting it.

For at least one important group of cases the Courts preferred a more drastic solution, which rendered it unnecessary to resort to either impossibility or " good faith." The Civil Code provided that contracts of employment and contracts of partnership could be freely terminated by either side for " important reasons," even though the period for which they had been concluded had not yet expired.[15] An employer who had engaged a manager for a period of 5 years could terminate the contract when the manager began to live in concubinage with a loose woman in a manner giving offence to the

[11] See the reference by Rehbein, l.c. to D. 46, 3, 98, 8 (Celcius), and Sokolowski, *Philosophie im Privatrecht*, vol. I, pp. 69ff.; recently F. Schulz, *History of Roman Legal Science* (1946), pp. 84ff.

[12] See e.g., Planck-Strohal, *Kommentar zum BGB*, vol. 2, s. 275, note 1, in the first, second and third editions 1914), Kipp, in Windscheid *Pandekten*, 9th ed., s. 264, appendix 1, Titze l.c., pp. 2ff., and others.

[13] RGZ, vol. 57, pp. 116ff., and similarly vol. 65, p. 29.

[14] See especially the brilliant criticism by Siber, l.c. (above, note 13).

[15] Ss. 626 and 723

public.[16] The Courts considered these rules as the result of a legal principle: *Dauer-Schuldverhältnisse,* i.e., obligations where the debtor's performance extends over a period of some duration can always be terminated for " important reasons."[17] This rule did away with a considerable part of the problem of frustration.[18] It required economic vibrations of more than ordinary strength to show that it had not succeeded in eliminating it.

C. The Development of the Doctrine of Impossibility During and After the First World War.—The outbreak of the first world war brought such vibrations. One of the first cases to be decided had some similarity with the English coronation cases.[19] An innkeeper had hired space from an Association which had been preparing an international exhibition to be held at Leipzig in 1914. Owing to the outbreak of the war, the exhibition had to be greatly reduced in scope. The innkeeper asked for a corresponding reduction in the rent payable by him. The Supreme Court held that this demand was justified. The Society had promised to hold an exhibition of a certain size. This promise could not be fully performed now. Performance had therefore become partly impossible. This justified an appropriate reduction of the rent.

But the new developments sorely tested the flexibility of the doctrine. A catastrophic rise of prices set in, surpassing all rises ever known in history before. Industrialists had promised delivery in the assumption that prices, though subject to such fluctuations as one knows do happen, would not rise out of all proportion to human experience and calculations. The Courts, reluctant to relinquish altogether the principle of " pacta sunt servanda," anxiously looked for some rule by which to distinguish those cases in which the debtors could be discharged and those in which they would have to bear the burden of rising prices. They long clung to the doctrine of impossibility. A number of decisions held that performance was impossible if by performing the debtor would bring about his own economic ruin.[20] That was later extended: it was not necessary that the *one* performance at issue in the case was ruinous; it sufficed if performing *all* the obligations affected by the rise in prices would result in the debtor's ruin.[21] But this test had to be abandoned. It granted preference to those debtors whose business was built on shaky foundations. The Supreme

[16] RGZ, vol. 38, p. 116. The standard commentaries on ss. 626 and 723 give many other significant examples. In the case of commercial partnerships it is necessary that a judicial decision recognizes the existence of " important reasons," see Commercial Code, s. 133.

[17] RGZ, vol. 78, p. 421; 88 pp. 90ff. at 105; 94 pp. 234ff.; 95 pp. 166ff. O. v. Gierke had drawn attention to this problem in his essay in Jhering's *Jahrbuecher fuer Dogmatik,* vol. 64, pp. 355ff. A convenient summary in Oertmann, *Kommentar zum BGB, Recht der Schuldverhaeltnisse,* 5th ed. (1928), vol. 1, pp. 14f.

[18] An interesting example of a modification of the doctrine of impossibility through the principle of good faith (s. 242) is the so-called rape-seed case (RGZ, vol. 84, p. 125). In this case the debtor had promised delivery of rape-seed of a special kind, grown only by him. In consequence of the extraordinary drought of 1911 much smaller quantities of rape-seed were available than could have been reasonably expected. The question arose whether the debtor had to satisfy the various purchasers in the order in which they had brought their claims, so that those who applied for delivery first would receive their full quota, while the others received nothing, or whether he had to distribute the available quantity in proportion among the purchasers? The Court argued that the purchasers formed a community of risk and that consequently proportional distribution had to take place. This rule was applied in a number of later cases, see RGZ, vol. 95, p. 264; 100 pp. 134ff., and others.

[19] RGZ, vol. 88, p. 108.

[20] RGZ, vol. 98, pp. 18ff., at p. 21; 99 p. 258; *Juristische Wochenschrift,* 1919, p. 673, and a number of further decisions.

[21] RGZ 100, 134, the first of a number of decisions (see also RGZ 101, p. 79 and 102, p. 272) which are known as " motor-car cases," because the goods sold were cars whose prices had risen beyond all expectations, e.g., in the case RGZ 101, p. 79, fifteen times! Nevertheless, it could not be said that the vendor was facing ruin by performing any one of the individual contracts. Only the performance of all pending contracts could be said to entail this danger.

Court had every reason to be grateful for the freedom which Continental law grants to the courts: to abandon principles, even though they have been adopted by more than one decision of the highest authority.[22]

A number of judgments once more stressed the aspect of identity, which had in pre-war times been used to distinguish between impossibility and mere delay.[23] When with the progress of the inflation it became more and more clear that what had seemed to be a rise of prices, was in effect a fall in the value of money, the Supreme Court tried to improve upon this test by replacing the requirement of identity of performance by that of equivalence of values.[24] It was of the nature of a reciprocal contract that each party considered its performance as an equivalent for the counter-performance of the other. Though there need not be equality of values between the performances, there had to be at least some relationship of adequacy. Where this was destroyed, the performance had to be treated as impossible.

The introduction of the equivalence test in fact signified the approaching end of the usefulness of the doctrine of impossibility. The decision now depended on considerations that had only a nominal connection with the doctrine of impossibility. The position was aggravated by the fact that the courts were forced to introduce a new distinction that was also wholly alien to the doctrine of impossibility.[25] In the case of contracts of a speculative character the debtor had to bear the consequences of even a very considerable rise of price. In the case of contracts of a less speculative character, however, the doctrines of identity or equivalence could be applied in their full force. Thus the conception of impossibility receded into the background. The economic motives of the parties, the nature and purpose of the transaction and their relation to the change of circumstances began to matter far more. The end of the doctrine of impossibility came when the Supreme Court was confronted with a case in which both parties refused to accept the only remedy which the doctrine of impossibility offered, namely, the discharge of the contract.

In this case[26] the plaintiff had let to the defendants factory accommodation in Berlin. Under the contract the plaintiff was bound to supply to the defendants steam for industrial purposes. The change in the value of money rendered the rent a ridiculously inappropriate consideration for the value of the steam that had to be supplied. The plaintiffs demanded an increase of the rent. The defendants objected. Neither party wished to rescind the contract. The Reichsgericht granted the plaintiff's demand. But it had to turn for support to considerations very different from those on which it had so far based its attitude to the problem of frustration.

D. The Clausula Rebus Sic Stantibus and the Basis of the Transaction.— During the seventeenth and eighteenth centuries a number of legal writers had contended that every contract had to be considered as being concluded under the implied condition that there would be no essential change in the circumstances under which it had been concluded. This doctrine of an implied

[22] See RG in *Juristische Wochenschrift*, 1921, p. 833, RGZ 103, p. 177.

[23] See e.g., OLG Frankfurt Main, *Juristische Wochenschrift*, 1919, p. 940, RGZ, vol. 99, p. 115, and *Juristische Wochenschrift*, 1921, p. 833.

[24] RGZ, vol. 107, p. 140.

[25] See RG *Juristische Wochenschrift*, 1, 18, p. 33; 1919, p. 444; 1920, p. 376; RGZ 92, p. 87; 101 p. 79, at p. 82; 103 p. 328, at p. 332; 106 p. 177, at pp. 181 and 183, and many others, see the list in Kegel-Rupp-Zweigert, *Die Einwirkung des Krieges auf Vertraege* (Beitraege zum auslaendischen und internationalen Privatrecht, No. 17; 1941), p. 135, note 6.

[26] RGZ, vol. 100, p. 129 (also in *Juristische Wochenschrift*, 1920, pp. 961ff.). The case resulted in an interesting discussion, see Endemann, *Juristische Wochenschrift*, 1921, p. 10, Hachenburg, *Juristische Wochenschrift*, 1920, p. 964. The Supreme Court had in previous cases expressly refused to alter the terms of a contract, see RGZ, vol. 86, p. 398, and vol. 90, p. 375.

" clausula rebus sic stantibus " had made a great impression upon legal practice and theory. It was expressly recognized in some of the earlier codifications.[27] During the quiet period of the nineteenth century, however, it had lost its hold upon the doctrine of civil and commercial law. The needs of the time now proved stronger than the force of authority and precedent. The clausula rebus sic stantibus was brought out of the dustbin of history in which it had rested for over a century. In its original form[28] this doctrine lacked both a proper legal justification and a precise definition of its requirements and its results. All these were furnished now by one of the most successful efforts of legal scholarship in modern times. The incident is characteristic of the co-operation that exists in a Continental legal system between legal theory and practice. It should help to dispel the myth that codified legal systems are necessarily more inflexible than case-law systems.

In 1852, Windscheid had published a book in which he pleaded for the adoption of the conception of requirement (*Voraussetzung*).[29] " Requirement," according to him, is an " undeveloped condition." It differs from a condition in so far as the party, though intending that the effects of a transaction should take place only if the requirement is complied with, did not by express declaration make this a term of the transaction. Where, however, the other party was in a position to conclude from the circumstances of the transaction that the requirement forms an element of his opponent's intention, the latter can according to Windscheid refuse performance or recover any performance made by him if the requirement is not complied with. Undoubtedly this doctrine went too far. It was rejected by the overwhelming weight of opinion among Windscheid's contemporaries and later by the legislators of the Civil Code. Nevertheless, it contained a kernel of truth. In 1921 a celebrated exponent of the German Civil Code, Professor Oertmann of Göttingen University, revived it in a greatly improved form, renaming the conception " contractual basis " (*Geschäftsgrundlage*)[30] and defining it as follows:[31]

> " Contractual basis " is an assumption made by one party that has become obvious to the other during the process of the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence, of circumstances forming the

[27] See *Code Maximilianeus Bavaricus*, Civilis (1756), Part 4, Ch. 15, s. 2, and Prussian *Allgemeines Landrecht* I, 5, 377-379. For a historical survey see Osti, *Rivista di diritto civile*, vol. 4 (1912), pp. 1ff., 5 (1913), pp. 471ff. and 674ff. A brief comparative survey is given by Schmitz, *Clausula rebus sic stantibus, in Rechtsvergleichendes Handwoerterbuch*, vol. I (1929),pp. 634ff.

[28] RGZ, vol. 100, p. 129.

[29] Windscheid, *Die Lehre des roemischen Rechts von der Voraussetzung* (1850); a summary of Windscheid's views will be found in his *Pandekten*, vol. 1, s. 97ff. Kipp's edition gives a complete bibliography of the learned dispute caused by Windscheid's theory. The best criticism will be found in Lenel's essays in *Archiv fuer die zivilistische Praxis*, vol. 74, pp. 213ff., and 79, pp. 49ff. See also Gradenwitz, *Der Begriff der Voraussetzung*, 1880.

[30] Oertmann, *Die Geschaeftsgrundlage, ein neuer Rechtsbegriff* (1921). This work, too, caused an animated discussion. Among the critical essays by other scholars reference may be made to the essays by Locher, *Geschaeftsgrundlage und Geschaeftszweck*, in *Archiv fuer die zivilistische Praxis*, vol. 121, p. 16, and Krueckmann, *Die Voraussetzung als virtueller Vorbehalt, Archiv fuer die zivilistische Praxis*, vol. 131, pp. 1ff., and to Leonhard, *Allgemeines Schuldrecht* des BGB (1929), pp. 415ff. For a convenient summary and criticism see Suess, *Wesen und Rechtsgrund der Gewaehrleistung* (1931), pp. 122ff. One of the drawbacks of Oertmann's study is that it contains neither a historical nor a comparative chapter. Oertmann does not even seem to have noticed that the term " Vertragsgrundlage " is actually used by the Swiss Code of Obligations Art. 24 (4).

[31] Oertmann, 2 c., p. 37. This formula was for the first time referred to by the Supreme Court in RGZ, vol. 103, p. 332, i.e., barely half a year after the publication of Oertmann's book. It has since been literally repeated in dozens of judgments of the Supreme Court, see, e.g., RGZ, vol. 105, p. 406; 116 p. 15; 126 p. 243; 135 p. 339, at p. 346; 146 p. 376; 168 p. 121, Seuffert's Archiv, vol. 94 (1939), pp. 9ff.

basis of the contractual intention. Alternatively, " contractual basis " is the common assumption on the part of the respective parties of such circumstances.

The weaknesses of this definition, repeated in hundreds of decisions of the Supreme Court, will not escape a mere tyro in the science of logic. Its merits are that it correctly, or at least nearly correctly, described a situation that is not properly met by other juridical conceptions. In the Coronation cases, referred to by Oertmann himself, it was not a condition that was not fulfilled. Nor could one speak of an impossibility of performance, otherwise than in a very strained sense of the word. Nor was there anything wrong with the intentions of the parties: the parties had never thought of what really did happen. The characteristic feature of the situation was that an assumption made by both parties and relating to circumstances forming the very basis of their contractual intention was wrong. Oertmann gives many instructive examples:[32]

> An industrialist orders coal for a factory to be delivered regularly during a certain period. During this period his factory is closed down by order of the Government for reasons of national emergency. A merchant has ordered goods. The goods are placed under control. He is no longer allowed to sell them.

Above all there were the inflation cases. There can be no doubt that the conception of " contractual basis " came at the right moment to analyse a perplexing, but unfortunately all too frequent situation.

The doctrine was conceived under the impression of the inflation cases.[33] But it was flexible enough to prove its worth when it was no longer required for these cases, partly as a result of a better appreciation of the limits of monetary nominalism and partly in consequence of legislative action.

It is one of its most important merits to recognize that frustration is only one, though in practice the most frequent, type of a wider category of cases, styled by Oertmann: " lapse of the basis of contracts " (*Fortfall der Geschaefts-Grundlage*). Because the doctrine covers so many types of cases, it does not provide a uniform solution. Where the contractual basis has wholly lapsed each party is entitled to rescind the contract in accordance with the rules of the Code relating to rescission. That means that each side must return to the other everything received previously in pursuance of the rescinded contract or, where this is impossible, pay compensation for it.[34] In other words: rescission has retroactive effect. This does not always mean that the retroactive effect refers back to the time of the conclusion of the contract. If the contract has been in operation for some time, both parties performing their respective liabilities, and if circumstances then change and some time after the change one party rescinds the contract, the retroactive effect takes place only from the time when the " basis of the contract " actually has " lapsed."[35] Different considerations apply in those cases in which the " basis of the contract has only partly lapsed," in other words where both parties still uphold the contract. In cases of this kind the Supreme Court, going far beyond Oertmann's proposals, has held that the Courts have power to shape the contract for the parties in accordance with the change in the circumstances.[36] The Court based this power upon s. 242 BGB—certainly a very thin argument. Experience has, however, shown the necessity for this development of the basis-of-contract theory.

[32] Oertmann, l.c., p. 153f.
[33] See Oertmann, l.c., pp. 151ff.
[34] Oertmann, l.c., pp. 161f.; RGZ, vol. 103, p. 177; 106 p. 7; 107 p. 124.
[35] Oertmann, l.c. p. 159ff.
[36] See Oertmann, 2. c., pp. 165ff.; RGZ, vol. 107, p. 124; *Juristische Wochenschrift*, 1934, p. 2685.

One of the most remarkable doctrines that have resulted from this aspect of the doctrine of "Geschaeftsgrundlage" is the conception of the "claim for adjustment" (Ausgleichsanspruch).[37] This was first developed in connection with post-inflation cases. A had sold to B a house after paying off mortgages in inflated currency. After sale and transfer had been completed, the revalorisation laws came into force. A had consequently to make unexpected further payments to the mortgagees. The basis of the contract between A and B, i.e., the assumption that the mortgages had been paid off, had therefore lapsed. The Supreme Court held that A had a claim against B for an equitable contribution to the payment made by A to the mortgagees. If B refused to make this contribution A could elect to rescind the contract of sale.[38] The doctrine of the Ausgleichanspruch has later been extended to numerous situations other than inflation cases.[39] It is confined to cases of reciprocal contracts.[40] It does not apply if the contract is wholly executed, though this principle has been interpreted in such a way as to include the mortgage-revalorisation cases, notwithstanding the fact that the sale had already been completed.[41]

In the further development of the doctrine of Geschäftsgrundlage three distinct tendencies must be noted. In the first instance the Courts were not always inclined to investigate meticulously whether the parties or one of them had with full knowledge and without protest on the part of the other been motivated by assumptions of vital importance for the contract and proved to be wrong. The formula seemed too cumbersome in a period in which it was constantly invoked. The elastic rule of "good faith in the performance of contracts" (s. 242 BGB)[42] and the much more dubious *clausula rebus sic stantibus*—never fully defined[43]—were often quoted in support of the decision in addition to, and sometimes even in the place of, the Geschäftsgrundlage-doctrine. In the second instance the Courts were trying to keep the application of the doctrine within bounds. It is never enough if one of the parties was motivated by an erroneous appreciation of the legal or factual position, not shared by the other.[44] There is no lapse of the basis of contract if there is not an economic upheaval of really fundamental character.[45] The economic crisis of 1929/30 and the Austrian crisis of 1930 and 1931 had not sufficiently far-reaching consequences to qualify for the rank of an economic upheaval of this type.

Finally, judicial adaptation of the contract to the new conditions of life become more and more the rule and termination by way of rescission the

[37] See on this interesting conception Hedemann, *Reichsgericht und Wirtschaftsrecht* (1929), pp. 312ff.; Oegg in *Kommentar von Reichsgerichtsraeten zum BGB*, vol. 1, 9th ed. (1939), pp. 472ff.; Kegel-Rupp-Zweigert 2. c., pp. 101ff.

[38] The leading case is RGZ, vol. 112, p. 333; later decisions are 119, p. 138; 120, p. 290; 121, p. 133; 123, p. 167.

[39] RGZ, vol. 141, p. 212; 145, p. 51; 147, p. 286; 148, p. 33; 163, p. 324.

[40] RG. Seuffert's *Archiv*, vol. 94 (1939), p. 9.

[41] RGZ, vol. 142, p. 23; 163, p. 324.

[42] See, e.g., RGZ, vol. 153, p. 356f.

[43] See, e.g., RGZ, vol. 121, p. 133, where the *clausula rebus sic stantibus* doctrine is treated as having the same meaning as the doctrine of Geschaeftsgrundlage. This is by no means an isolated view. Even a number of academic writers see no real difference between the two doctrines (see, e.g., H. Lehmann, *Allgemeiner Teil des BGB*, 3rd ed. (1928), p. 258, Heck, *Grundriss des Schuldrechts* (1929), p. 95), provided, of course, that the clausula is conceived as an implied element of every reciprocal contract. Against this view see, however, Oertmann l.c., pp. 44ff. and Oertmann *Allgemeiner Teil des BGB* (Commentary), ed. 19 Note 1*e* before s. 158. Similarly Schlegelberger-Vogels-Epping, *BGB, Kommentar* (1939), s. 242, note 18.

[44] See RGZ, 157, p. 171; a similar decision is also *Juristische Wochenschrift*, 1925, p. 1633. This latter decision has been strongly, but unconvincingly, criticized by Stoll, *Vertrag und Unrecht*, vol. 1 (1936), pp. 38f.

[45] RGZ, vol. 107, p. 124ff. and 151ff. Considerations of space prevent a description of the (naturally very vague) principles applied by the Courts in readjusting the contractual relations between the parties.

exception. It was felt that the latter was in effect the more radical solution. It could be applied in those cases only in which the less extreme remedies were inappropriate. This may have been partly due to the growing influence of totalitarian ideas. The contractual relation appeared in the totalitarian ideologies as valuable *per se* and therefore worth saving by all means. The resulting regimentation of the parties by the Bench was no longer felt to be objectionable.

Like everything else in German cultural life the doctrine of Geschaeftsgrundlage had to pay toll to the prevailing Party ideology soon after 1933. It served as an instrument for dissolving contracts, especially pension agreements, concluded with Jews or other Anti-Nazis.[46] For this purpose it had to undergo a process of adaptation to the new ideology. The stress which it laid upon the assumption of the parties, made it appear as a liberal doctrine. In the National-Socialist state that would not do. A re-definition was required. Geschaeftsgrundlage now appeared as the " existence and continuation of those circumstances which are required to make the transaction appear as a useful order of things which is appropriate within the total complex of the racial system."[47] It meant the continuance in existence of conditions within which the contract would appear to be " nonsensical and useless."[48] In considering what is and what is not nonsensical, public interests and not the private purposes and motives of the parties must be taken into consideration.

At the same time the Courts took an important step to narrow down the sphere of application of the doctrine. They pointed out that in their view the ultimate dogmatic basis of the theory had been the rule of good faith in the performance of contracts. A lapse of the basis of contract could therefore be pleaded only in those cases in which the creditor by desiring to maintain the contract in its original form is guilty of a breach of good faith.[49] Similarly the debtor can plead the doctrine only if his own actions have conformed with the requirements of good faith. A further consequence is that the application of the doctrine cannot be wholly excluded by a clause in the agreement. This rule is undoubtedly sound: the benefits of the rule would soon enough have been confined to the big combines who cannot be forced to sign standardised contracts, but can force others to sign them. It has, however, been weakened by the admission on the part of both, writers and Courts, that stricter standards have to be applied where such an agreement has in fact been signed. The debtor can in this case plead the lapse of the basis only if the enforcement of the contract would lead to his economic ruin.[50]

A number of writers have suggested that the debtor who exercises his right of rescinding a contract on the ground of a lapse of the basis of contract ought to indemnify the other party for the expenses caused by the conclusion of the contract.[51] This did not find support from the Courts,[52] who were also disinclined to follow the new doctrines and to discard entirely all references to the assumptions of the parties.[53]

[46] See Palandt, *Buergerliches Gesetzbuch, Kommentar,* 6th ed. (1944), s. 611, note 3*a*.

[47] Palandt, 2. c., s. 242, 6. c. Similarly Schlegelberger-Vogels-Epping, 2.c.

[48] Larenz, *Vertrag und Unrecht,* vol. 1 (1937), p. 164. Five years later the Supreme Court felt still some hesitation to follow suit, see RGZ 168 (1942), pp. 121ff.

[49] RGZ, vol. 152, p. 403; 153, p. 358; 158, p. 175; 160, p. 265; 168, p. 126.

[50] RGZ, vol. 166, p. 49, Herschel, *Deutsches Recht,* vol. XI (1941), p. 783; Palandt, 2. c., s. 242, note 6*a*. This decision constitutes a notable change of front. See on older views RG in *Juristische Wochenschrift,* 1919, p. 444, and 1920, p. 376, and Kegel-Rupp-Zweigert, l.c., pp. 133ff., with copious references.

[51] See, e.g., Stoll, 2. c., p.39.

[52] It was, however, adopted by a Committee of the Acadamy of German Law, which in 1936 prepared an abortive reform of the Law relating to breach of contract and impossibility; see Stoll, *Die Lehre von den Leistungs-Stoerungen* (1936); *Schriften der Akademie fuer Deutsches Recht,* pp. 132f. and 136f. Schlegelberger-Vogels-Epping, l.c., note 19, say that this draft can already now (i.e., during the Nazi period) be considered as a directive for the development of the law.

[53] This was clearly stated by the Supreme Court in RGZ, 168, pp. 121ff., at p. 126f.

E. Judicial Assistance in respect of Contracts.—The new power of remaking the contract for the parties places a heavy burden upon the Courts if in an emergency the exercise of this power is suddenly demanded in thousands of cases. Ordinary civil proceedings are not the most expeditious manner of dealing with such situations. The normal purpose of civil proceedings is the enforcement of existing rights, not their modification by order of the Court. The latter is an activity that belongs to the realm of administration rather than to that of jurisdiction.

Arguments such as these led at the outbreak of the present war to the issue of the Decree on Judicial Assistance in respect of Contracts (Vertragshilfe-Verordnung).[54] By this decree[55] far reaching powers of amending certain types of existing contracts, of granting time for the performance of contractual obligations and of permitting performance by the payment of instalments have been conferred upon the Judges at the Local Courts (Amtsgerichte). The procedure is that of " non-contentious jurisdiction," which is especially adapted to judicial activities of a predominantly administrative character. The hearing is *in camera*. The judge is not confined to the evidence offered by the parties, but can make his own investigations. Very roughly the decree can be said to aid three types of debtors: owners of businesses whose economic strength is considerably reduced by the war, debtors who are affected by the occupation of German territory or similar consequences of war and any kind of owners of real property. The powers of the judge are somewhat differently defined in each of these three cases, but are in every one of them very far-reaching indeed.

There can be no doubt that the Decree has greatly facilitated the settlement of disputes in " frustration " cases and that it has succeeded in a number of such cases in replacing total " frustration " by a reasonable compromise between the parties.

F. The Present Position.—The Decree on Judicial Assistance in respect of Contracts could of course not provide for a situation such as resulted from the total collapse of the Reich and the destruction of its principal cities. In many cases debtors were unable to perform their obligations, because during the war years they had worked for the Reich and other public bodies which have now either completely disappeared or at least stopped all payments. Many other debtors, not themselves so affected, were faced with the consequences of the insolvency of business friends who were directly affected by the cessation of payments on the part of the Reich and other public bodies. In the district of Bremen, which is under American occupation, the operation of the Decree on Judicial Assistance has been extended to such cases.

Elsewhere other solutions have been adopted. The Local Court of Tempelhof in a judgment[56] that was widely noticed in Germany has held that debtors who are directly or indirectly affected by the cessation of payments on the part of the Reich have a right to plead their situation in defence to any claims brought against them arising out of transactions completed before the collapse. To bring an action against such debtors constitutes according to this judgment a breach of good faith. No creditor can demand that the debtor alone should

[54] Of November 30, 1939 (RGB1 I 2329). A large-size commentary on this law has been edited by Vogels, Rexroth and Weitnauer, *Vertragshilfe and Kriegs-Ausgleichsverfahren*. Boetticher, *Richterliche Vertragsgestaltung in Deutsche Rechtswissenschaft*, vol. 7 (1942), pp. 125ff., is a good systematic study. Brief summaries: Schlegelberger-Vogels-Epping, 2. c. note and before s. 241, Volkmar, *Deutsche Justiz*, 1939, pp. 1813 and 1856, Vogels, *Deutsches Recht*, 1939, p. 2090.—The Decree supplements the existing law. It has not abrogated the doctrine of Geschaeftsgrundlage. The debtor whose case is covered by the decree has the choice between seeking relief under the decree and pleading the doctrine of Geschaeftsgrundlage, see on this question Kegel-Rupp-Zweigert, 2 c., pp. 153ff.

[55] It is supplemented by a number of special decrees applying to individual branches of commercial life only. See Reichsgesetzblatt, 1940, vol. I, pp. 577ff. and 671ff.

[56] See *Sueddeutsche Juristenzeitung*, vol. 1 (1946), pp. 97.

carry the consequences of the collapse, while the creditor himself can demand full payment. The debtor must be given time to reconstruct his economic existence. *Pro tempore* all such actions against him must therefore be dismissed. In the British zone Decrees[57] have been issued which enable all actions of this kind to be adjourned for the time being, if the debtor applies for such an adjournment, and if there are no special reasons which justify the assumption that the debtor can in fairness be expected to perform.

This, of course, is only a temporary alleviation of one symptom, not a cure of the disease. The present situation will, undoubtedly, require more far-reaching measures than have been devised in the past. There is little doubt that the Courts will have to be given wider powers than they have ever had before. Only this can enable them to deal with a situation that is, it seems, without precedent in the legal history of Europe.

NATIVE TRIBUNALS

[*Contributed by* A. N. Doorly, Esq.]

In *Africa Survey*, that authoritative and far-reaching study of the principle and practice of government, particularly in the British dependencies in Africa, Lord Hailey made special reference to the variations which exist in the numbers and procedure in the Native Tribunals in Kenya and to the lack of a regular plan for their future development.

This state of affairs was due to the omission by the Kenya Legislature to do more than provide in general terms for the recognition of Native Tribunals constituted in accordance with native custom, for the delimitation of their jurisdiction and for the general supervision and testing of their decisions by way of revision or appeal. No detailed provision was made for the manner of or the qualifications required for the appointment of members of Tribunals, nor, except in some few particulars, for the practice and procedure to be observed and followed. Although power was taken to make rules and regulations governing practice and procedure, no such rules or regulations were formulated.

It may well be that the circumstances of the day rendered the making of these provisions a matter of the utmost difficulty, and it is probable that the situation in this regard is not much easier to-day. However that may be, the result of the absence of any general direction on these important matters has been that the development of the Native Tribunals and the supervision of their practice and procedure have rested largely in the hands of the Provincial Commissioners, and still more in those of the District Commissioners and Officers. The holders of these offices are liable to change from time to time through the usual casualties of service—death, retirement, promotion and, more commonly, transfer. It is not surprising, therefore, that these important matters were the subject of numerous and, in some cases, of violent fluctuations according to the predilections of individual officers.

As a first step towards the remedy of this unsatisfactory condition the Kenya Government directed that a preliminary inquiry should be made with a view to proposals being submitted with regard to the functions and duties of a Judicial Adviser. A Judicial Adviser had recently been appointed in the neighbouring Protectorate of Uganda. This officer, it appears, was intended to be a co-ordinating and directing authority in regard to all matters connected with the Native Tribunals and the law to be administered therein, and at first the inquiry proposed was not intended to go beyond a consideration of the powers and functions to be exercised by this officer. Subsequently, wide and

[57] Decrees of the Presidents of Appeal Court in the British Zone of February 8, 1946. On some of the difficult problems of interpretation caused by this Decree, see the judgments of the Appeal Courts of Brunswick in Justizblatt fuer Braunschweig, 1946, vol. 51, and of Celle in Hannoeversche Rechtspflege, 1946, p. 48.

far-reaching terms of reference were drafted, which amounted to a direction to consider and report upon the whole system of the administration of the law in Native Tribunals and to make recommendations over a very wide field for their future development. Mr. Phillips, one of the Kenya Crown Counsel, was appointed to this task, and his report is published by the Government Printer, Nairobi (price 20 shillings).

This Report is an exhaustive and detailed work covering the whole range of subjects germane to the issues raised and to problems which await solution.

It affords proof of wide reading and knowledge on the part of the writer, not only of general jurisprudence, but also of the researches of students in the parts of Africa (particularly in the Union of South Africa) and elsewhere, in which the study and application of a native system of law has reached a more advanced stage of development than is the case in Kenya or in any other of the British dependencies in East or West Africa.

Those parts of Lord Hailey's work which are relevant to the subject have naturally and wisely been taken as the basis and ground-work of the inquiry. The Report abounds in quotations from *Africa Survey*, some of not inconsiderable length. Perhaps the most vital matter emphasized in these quotations is the recognition that, in respect to the adaptation of its indigenous law and legal system to changing conditions " Africa to-day is in one of the stages which at different times must have marked the development of law elsewhere." This statement is elaborated in various places and the admission that the problems with which this Report is concerned are not peculiar to Kenya or to the twentieth century places the matter in its true perspective. In other words, the development which is taking place in Kenya (and in other parts of Africa and of the world) is no new thing, it has happened before at many times and in many places throughout history. The experience of the past must be drawn upon and utilized, though allowance must always be made for the peculiar circumstance of modern Kenya with the violent impact of European and Asian settlement with all its upsetting concomitants upon the ways and habits of the native communities which in some respects (of which the development of their judicial system is one) have not perhaps attained the stage of development prevailing in these islands at the time of the Norman Conquest.

Apart from putting the problems committed to his investigation in their proper historical background, Mr. Phillips is the first person within the confines of a single report to give an overall picture of the Native Tribunal system of Kenya as it exists to-day and to set out the problems affecting its development as a whole. Doubtless much work has been done and some research made by Administrative Officers in the last forty or fifty years into the law and customs of the various tribes of Kenya. To that work much is owed and the Report offers ample proof that the debt is realized. This earlier work has, however, been generally and naturally of a local and piecemeal character. District Commissioners and District Officers have devoted their time and attention to the study of the native law and custom obtaining in their own districts and to the direction and supervision of the Native Tribunals in those districts. To the writer of this Report has been given the opportunity (and he has taken it with both hands) of surveying the present position of the Native Tribunals of Kenya as a whole and of making recommendations, sometimes in detail, for their development in a systematic manner.

It will not be possible to follow Mr. Phillips in all his interesting researches. Some process of selection is necessary and it behoves a reviewer to remember that the Report is but a preliminary inquiry from which doubtless legislative proposals will emerge and to walk warily in regard to matters (some of them contentious) which must be left to the decision of the Kenya Legislature. Many of the recommendations, however, are such that there can hardly be two opinions as to their advisability. Of these may be mentioned the necessity for the ascer-

tainment and the recording of native law and custom as it stands to-day, for the provision of means for the authoritative recognition of change in such law and custom, for more clearly defined machinery for the selection of members of Native Tribunals, for the raising of the standards, both moral and intellectual, of the members of Tribunals and for the closer and more instructed supervision of the work of the Tribunals and of the general problems connected with the subject.

From time to time references will be made in this article to the situation in regard to Native Courts or Tribunals in the Gold Coast and comparisons drawn between the circumstances there and in Kenya.

Although many Africans in the Gold Coast (particularly the Gold Coast Colony) have advanced farther on the lines of European civilization and education than all but a very few of the natives of Kenya, the fact remains that in both Colonies there exist and have existed for a considerable time Native Courts or Tribunals primarily concerned with the trial of actions in which the law applied is the native law and custom of the indigenous communities. Both Colonies, moreover, are at the present concerned with amendments to the law designed to strengthen the administration of justice in the Native Courts or Tribunals and in appeal therefrom.

In the Gold Coast recent legislation has been more concerned than is likely to be the case in Kenya—at any rate for the present or in the near future—with the closer integration of the Native Court system with the ordinary courts of the Colony. One remarkable feature of the new Gold Coast legislation is the disappearance of the Provincial Commissioners as courts under the Native Courts system. Their place is taken by the Land Division of the Supreme Court, which must sit with assessors when exercising its original jurisdiction in any cause or matter in which a question of native customary law is involved.

The Supreme Court of the Gold Coast includes at present three Judges of West African or partly West African descent. This fact naturally distinguishes the court in this connection very materially from the Supreme Court of Kenya, which has up to now consisted entirely of European judges.

In spite of the differences, however, the supersession of the Provincial Commissioners by a Division of the Supreme Court is a matter that is of considerable interest as pointing to a line of development which may be found to be suitable to the conditions of Kenya at some future time.

Furthermore, the fact that the Native Courts of the Gold Coast have a more clearly defined form of procedure, approximating more closely to that of the ordinary courts of the Colony than is the case in Kenya, make comparison useful in some cases by way of illustration and in others by way of warning.

One matter for warning may be mentioned here, namely, the undoubted abuse by many in the Gold Coast of the extensive rights of appeal that earlier legislation permitted. The new legislation is restricted in this respect. The most recent commission of enquiry, of which Mr. C. F. Havers, K.C., was Commissioner, had as its main *raison d'être* the fact that litigation in regard to land was having the effect of impoverishing many of the Native States. It may well be that further restrictions on the right of appeal will be recommended.

The basis of nearly all Mr. Phillips' recommendations is the finding that the most appropriate and practicable *forum* for the original trial of disputes arising out of native law and custom is an all-African bench consisting of a President and members to be appointed according to the terms of legislation specifically directed to the subject and exercising such jurisdiction as may be prescribed by warrant issued either by the Governor or with his approval. In other words, the Native Tribunal system should be maintained. Of the wisdom of this recommendation there can be little doubt. In the first place, the only practicable alternative would be the setting up of benches, each consisting of a single magistrate. Even if it were possible in the near future to

obtain trained men capable of exercising the jurisdiction with skill and impartiality (and it probably is not possible), the abolition of the Native Tribunals would constitute a complete break with the indigenous system of judicature and would be likely to be interpreted as a withdrawal from the people of a privilege which they have enjoyed in some measure from the earliest days of British administration. Secondly, there appears to be no justification for the abolition of the Native Tribunal system. It may be true that all is not well with the Native Tribunals and that development in some of the more backward Tribunals has been slow, but the account given in the Report of the working of the Tribunals generally and the notes of various administrative officers cited are proof, at any rate to one whose experience of Native Tribunals in East Africa goes back more than thirty years, that in many of the Tribunals remarkable advances have been made which reflect great credit on the officers to whom these improvements are largely due, and furnish a hopeful augury for the future.

It may be that the Kenya Government has moved too fast in conferring a considerable measure of criminal jurisdiction in regard to statutory offences upon Tribunals which, by reason of the lack of knowledge and of the means of acquiring knowledge, are not well fitted at present to adjudicate adequately upon such matters. This is the view taken in the Report, but a remedy is offered in the proposal for a careful consideration of the degree of ability of each Tribunal before the re-issue of the warrant conferring such jurisdiction.

In the exercise of their jurisdiction in civil suits, however, many of the Tribunals are shown to have discarded to a large extent the earlier methods of permitting facts to be proved by the oath of a single party or by ordeal, and to make much more general use of the procedure of the taking and sifting of evidence given on oath by witnesses sworn to tell the truth and of relying on cross-examination as a test of credibility. Trial by ordeal should be prohibited. but the Report furnishes evidence that a party is still on certain occasions permitted to take an oath calling down death upon himself or his family within a specified time if his claim is not just. When such an oath is taken, the only matter left for decision is the question whether or not a death has occurred which can be regarded as resulting from the taking of the oath. It is true that attempts have been made to dissociate the Native Tribunals from the active administration of such an oath and to regulate its use. It is somewhat ironical, however, that certain directions issued by an officer in this matter and quoted in the Report should have contained a reference to the reporting of " any death resulting from the oath." Such a method of adjudication is hardly one which should be permitted to continue with the apparent approval or, at any rate, the connivance of the Government. The existence of such a procedure raises difficulties in the Court or Courts of Appeal. When the decision has been given in a Tribunal based upon the belief that a death has occurred in consequence of the oath, what is the position of a District Commissioner hearing an appeal ? Is he to support a finding purporting to have been based upon the action of the supernatural powers, or is he to act according to his own lights as he is entitled to do in a retrial ? If he supports a decision arrived at by these means, he is acting contrary to the dictates of his conscience, as presumably he does not believe that there is any connection between the death and the oath; if he ignores the decision, then the proceedings in the original Tribunal become a nullity. There can be no question that the whole weight and influence of the Government should be directed towards the abolition of such a procedure in all matters which may come before a Tribunal. It may be of interest in this connection to mention that, under the apparently harmless direction that a pagan should be " sworn according to his religious belief " all courts in the Gold Coast (not excluding the Supreme Court) have, in many cases unwittingly, permitted oaths to be taken in the form: " If I give false evidence,

may I be killed by my fetish "; but in those courts the oath was merely accepted as binding, there was no adjournment to ascertain whether the fetish would or would not "work." Apart from its impropriety, the weakness of such a form of oath is that the perjurer, who finds himself unaffected by his false swearing, ceases to believe in the efficacy of the curse which he has called down upon himself and the oath loses all its binding force.

The ascertainment of the native law and custom of the various tribes of Kenya is by itself a work of considerable magnitude that will require close and continuous study and research. Work in this field has been performed both by Administrative Officers from time to time and by trained and qualified anthropologists, but so far as is known there has hitherto been no systematized effort to record the law and custom of all the tribes.

The research which has already been carried out will doubtless form a basis for further inquiry, but Kenya is not so fortunate in this respect as, for example, the Gold Coast, where members of the local Bar, men of African descent and familiar with native customary law from childhood, have devoted themselves from time to time for more than fifty years to work of this nature and have published valuable and authoritative works on the subject. In this connection may be mentioned Renner's *Gold Coast Reports,* Sarbah's *Fanti Customary Law,* Sarbah's *Fanti Law Reports* and Danquah's *Akan Law.*

Kenya has not yet produced its own men with the ability to undertake such tasks, nor is it likely to do so in the immediate future. Mr. Phillips proposes that the work should be undertaken by Provincial Judicial Officers working with Advisory Committees under the supervision of the Judicial Adviser.

The Advisory Committees will doubtless provide the local knowledge, the Provincial Judicial Officers will be administrative officers selected by reason of their previous experience and the Judicial Adviser a legal man with special knowledge of the subject.

In the circumstances of Kenya the proposals seem to be the best which could be made.

The setting up of a system for the authoritative recognition of changes in native law and custom is a matter which, though its necessity is obvious, also raises problems not easy of solution. The Report recommends that such recognition should be by means of legislation and suggests the creation of a Board or Committee on Native Law which, among its other functions, would have the duty of scrutinizing any proposed legislation affecting native law which should not be enacted without the previous approval of the Board.

The arguments against the general use of case law—i.e., Tribunal-made law—as a means of modifying native law or custom are strong and convincing. It is to be noted, however, that the Report itself bears testimony to the fact that the process of modification by means of Tribunals' decisions is already in operation. Examples of such decisions are probably most common in the "mixed" Tribunals in the Municipalities and non-tribal areas. These Tribunals have already found themselves faced with situations requiring decisions which either are not referable to native law or custom or to which the native law or custom is no longer properly applicable in the opinion of the Tribunals. In these circumstances the Tribunals have not hesitated to give decisions which are tantamount to the recognition of new custom.

Mention of "mixed" Tribunals, that is, Tribunals consisting of members belonging to different tribes with jurisdiction over parties who may also be of different tribes, raises the question of the nature of the law applied in such Tribunals.

So far as the criminal jurisdiction of these Tribunals over statutory offences is concerned (and this applies to all Tribunals) the proper law to apply is the Ordinance itself. This matter has been mentioned earlier and also the difficulty of such application.

In suits relating to land it may well be that the law of the place in which the land is situate (*lex loci rei sitæ*) is properly applicable; but in cases in contract or tort, in default of a law or custom common to both parties, a very real difficulty must arise. In these latter cases the application of the law of one or other of the parties is manifestly inequitable, yet the Tribunal itself has no law, unless it be common sense or natural justice, by which it can adjudicate upon the rights of the parties. The common sense of one man, however, is apt to make uncommon nonsense to another, while the principles of natural justice are too vague and nebulous to supply a regular yardstick with which to measure the rights and wrongs of litigants. The account given in the Report of the Nairobi Municipal Tribunal and its work shows that that Tribunal, adequately supervised, carries out its duties in a remarkably intelligent and apparently satisfactory manner, despite the difficulties attendant upon the lack of precision in regard to the content of the law to be applied.

A clear case, however, appears to be made in favour of the preparation of elementary codes dealing with such branches of the law as are included within the causes of action triable by such tribunals, to which native law and custom do not apply. This applies also in regard to procedure and evidence, but it must not be forgotten that the very simplicity of the directions given is apt to lead to much litigation on points of procedure, as has been found in the native territories in the Union of South Africa. The difficulties of the task are not to be underestimated, but that is not to say that the thing is impossible and should not be undertaken.

The preparation of these codes of directions and the recording of native law and custom will be of no advantage to the Native Tribunals unless means are found of making the contents of these guides clear and intelligible to the members. This raises in an acute form the matter of the standard of education and literacy of the Presidents, members and staffs of the Tribunals. It will probably not be possible for many a day to make ability to read and understand these directions a necessary qualification for membership of a Tribunal, but every effort should be made towards raising the standards of education of the members. The immediate objective, as the Report recommends, should be the recruitment and training of suitable persons to act as clerks in the Tribunals, perhaps at first in the Appellate Tribunals only, though the ultimate aim should be their provision in all Tribunals. These clerks should be men capable of understanding and expounding the written law applicable to the Tribunals. In addition they should carry out duties similar to those of the Clerks to the Justices in an English Court of Summary Jurisdiction. They should be natives of the districts in which the Tribunals function and should be of a type and character that would fit them in time to become Presidents or Members of Tribunals. Where such clerks are available, it should be a part of their duties to record the proceedings in the Tribunal. The keeping of full records of the evidence taken in Tribunals of the first instance would be a notable step in their development; for the existence of such a record must inevitably lead to a clarification of the issues involved and would afford a ready means of reference for the refreshment of the memories of the members before they proceed to judgment, especially useful in a long and complicated action. Such a record is not essential where there are appeals in the form of retrials *de novo*, but the absence of an original record means presumably that the first appellate court has before it, at the opening of the appeal, no more than the claim of the plaintiff and the decision of the original Tribunal thereon. These provide no means of checking the evidence tendered at the appeal with the evidence originally given and no guarantee against the making of an entirely new case on appeal. The fact that the first Tribunal of appeal may also take no record of evidence makes matters worse. In such a case it must be almost a matter of impossibility for the second court of appeal (under present legislation usually a British officer, the District

Commissioner) to decide whether or not the judgment of the original Tribunal or that of the first appellate Tribunal was reasonable or unreasonable having regard to the evidence tendered before it. The main ground for a decision of any appellate court on an issue of fact is in the circumstances incapable of proof and the European officer is to a large degree deprived of the assistance of persons peculiarly fitted by reason of their position to make right decisions upon matters of fact. It may be that in hearing appeals District Commissioners either obtain reports from the Tribunals or require the presence of some of the members for the purpose of furnishing information on these matters, but such reports are liable to error and cannot be regarded as a satisfactory substitute for the actual record of the original proceedings.

In the Gold Coast, where the system of Native Tribunals (now Native Courts) is integrated at the higher levels with the ordinary courts (the Supreme Court and the West African Court of Appeal) all the proceedings in the Native Courts are recorded, and it is remarkable how seldom the Judicial Committee of the Privy Council has been prepared to uphold a decision on appeal which had the effect of reversing the finding of the original Tribunal on a question of fact.

Mr. Phillips' historical survey and his description of the work and the procedure of the various Native Tribunals in Kenya emphasize clearly the vast diversities among the tribes, the great disparities between the standards of ability and of importance of different Tribunals and the notable difference between one district and another in the strength and solidarity of the indigenous institutions. All these matters make it necessary that any recommendations likely to be practicable should allow of considerable latitude in their application. No cut-and-dried system can be expected to be satisfactory in all districts. A development which might be suitable in one district to-day would be entirely inappropriate in another for a considerable time. These difficulties are fully recognized in the Report, which, while recommending a general plan for development, yet leaves open the road for its application at different times and by various stages in one district and another.

Although the Kenya Legislature has done no more by legislative act than recognize the Native Tribunals constituted under native law and custom, it is clear that the reforming zeal of certain officers has gone far beyond this, and many persons ineligible for seats in Native Tribunals have been appointed. Where the indigenous institutions were strong, these unauthorized appointments have caused trouble; where the indigenous institutions were weaker, the nominations have been accepted generally by the community. In respect of the more advanced districts, Mr. Phillips does not think it would be practicable to " put the clock back " and revert to the indigenous judicial system. In these districts he finds that the tendency has been to regard traditional qualifications as of less and less importance as time goes on and he considers that, so long as a certain proportion of the seats in these Tribunals are occupied by men with traditional qualifications, the remaining seats may with advantage be filled by men of probity and incorruptibility, intelligence and professional skill, judged either in terms of native law and custom or of modern knowledge and education, even though they would not have been eligible by indigenous standards. In this connection it should not be forgotten that in many Tribunals seats have been occupied by " ineligibles " during the last thirty years, which is a long time in Kenya history. In other districts, the Report finds that the appointment to the Tribunals of persons not having traditional qualifications would be an affront to public opinion or would prejudice the authority of the Tribunals, and in these districts it is considered that the possession of a traditional qualification must be the primary, indispensable, condition of appointment.

In regard to the manner of appointment to the Tribunals, it appears that the system of election by popular vote has been largely abandoned as unsatis-

factory and its reintroduction is not recommended. In its place appointment by the nomination of the District Commissioner is suggested, in some cases in consultation with the sub-committee of the Local Native Council, in others with the sub-committee acting in an advisory capacity only, according to the circumstances of the particular district.

The Report considers that it would be impracticable and harmful to the authority of the Native Tribunals to divide causes of actions into the categories of "indigenous" and "non-indigenous," the jurisdiction in the latter resting with the Native Tribunals as appointed, while an indigenous judicial body adjudicated upon the former. Arbitration is encouraged and the merits of the old-fashioned Elder as an arbitrator in a dispute relating to native law and custom are recognized. In such matters it is proposed that Native Tribunals should seek the advice of the Elders even when there is no reference to arbitration. There is no doubt that encouragement should be given to the settlement of disputes by arbitration. Provision could be made with advantage, it is suggested, for the formal reference to arbitrators of matters in dispute before action is filed, for awards thereon and for the making of such awards orders of the Tribunal which would then become capable of execution by the Tribunal. Presumably, Tribunals have an inherent right to refer to arbitration by consent of parties matters pending before them. If the right does not exist, there would seem to be a good case made for the power being conferred by legislation.

Before consideration is given to Mr. Phillips' suggestions for the reconstruction of the courts to exercise appellate jurisdiction over the decisions of Native Tribunals, it will be of advantage to set out in general terms the position under present legislation.

Apart from the extensive powers of revision given to Provincial Commissioners and District Officers and (in criminal matters only) to the Attorney-General, every decision of a Native Tribunal is appealable either to a Native Court of Appeal, or, if there is no Native Court of Appeal, direct to the District Officer, the *liwali* or the *mudir*. Appeal from a Native Court of Appeal lies to the District Officer, the *liwali* or the *mudir* in all cases as of right except in civil cases where the sum claimed exclusive of costs is less than 50/-, when appeal is only by special permission of the District Officer. Appeal from a *liwali*, a *mudir*, or a District Officer lies to the Provincial Commissioner, but there is no appeal from a District Officer where (in criminal cases) sentence does not exceed one month's imprisonment or where a fine of less than 50/- is imposed. There is no appeal at all from the Provincial Commissioner in cases relating to marriage, intestacy or immovable property, nor in other civil proceedings where the amount involved exclusive of costs does not exceed £50. In criminal proceedings no appeal lies from the Provincial Commissioner except in cases where a sentence of four months or more of imprisonment or a fine exceeding £15 is imposed. Where an appeal does lie from the Provincial Commissioner it would go to the Supreme Court by case stated; but this procedure had not been utilized up to the date of the Report.

By an amendment to the law made in 1942 a native was prohibited from filing an action in respect of immovable property situate within the native lands as defined in the Native Lands Trust Ordinance, 1938, in any court other than a Native Tribunal.

These provisions invite comment, first, in regard to the number of appellate courts—the "hierarchy of courts" referred to in the judgment of Sir Sidney Abrahams cited in the Report—for it must always be questionable whether the provision of so many courts of appeal is advisable or necessary, and, secondly, in regard to the position of the Supreme Court in relation to the Native Tribunal system. The latter is clearly the subject of contention, but it is a matter of such interest and importance that a few observations may be permissible.

Although the legal position is that in certain circumstances a litigant in a

Native Tribunal may test the correctness of a decision of the Provincial Commissioner by having a case stated for the opinion of the Supreme Court thereon, in practice the procedure for whatever reason has never been employed, and it is therefore true to say, as Mr. Phillips does, that for all practical purposes the Native Tribunal system is independent of the Supreme Court. Whether or not this is a desirable state of affairs is the bone of contention.

There can be no doubt as to the unsatisfactoriness of the position described in the Report whereby a litigant, who had unsuccessfully exhausted all his opportunities of obtaining a favourable decision under the machinery provided by the Native Tribunals Ordinance, was enabled to start the proceedings anew by filing suit in the Supreme Court on the same cause of action. That was a situation which clearly required to be remedied. Furthermore, it would probably be admitted by most persons that the Supreme Court with its comparatively complicated procedure and high costs is not generally a suitable *forum* for the initiation of proceedings in which matters are in issue which are governed by native law and custom. The necessity has been felt in other parts of Africa for restraining the exercise in such actions of the unlimited jurisdiction of the Supreme Court as a court of first instance. In the Gold Coast, for example, where Native Tribunals have exercised their jurisdiction without a break and where the exercise of this jurisdiction was recognized as long ago as 1883 in the Native Jurisdiction Ordinance, provision was made by that Ordinance that, where it appeared to a court (not being a Native Court or Tribunal) that an action brought before it was one properly cognizable by a Native Tribunal, the court should stop the further progress of the action before it and refer the parties to the competent Native Tribunal. The Supreme Court accepted the position as a necessary compromise to meet the peculiar circumstances, while its rights were preserved by the conferment upon it of jurisdiction as an appellate court under the Ordinance. That jurisdiction has been exercised freely and fully. In Kenya, however, there has developed a position whereby the Supreme Court is practically divorced from all connection with the administration of justice in matters which arise in Native Tribunals.

The Report makes suggestions which offer a possible solution of the two difficulties which are under consideration. It is proposed that, instead of appeals lying from Native Tribunals and Native Courts of Appeal to a District Officer and thereafter to the Provincial Commissioner, a new court—the Sessions Court—should be constituted, which would take over the appellate jurisdiction of both the District Officer and the Provincial Commissioner. This new court would consist of a panel with the Provincial Commissioner as the convening officer and chairman when he is present, the members being selected from the Provincial Judicial Officers, administrative officers and suitably qualified Africans. Where there are no Africans fitted for full membership of the Bench, provision could be made for the association of Africans with the court in the rôle of assessors.

The reduction of the number of appellate courts is probably desirable from every point of view.

The association with the Provincial Commissioner of the Provincial Judicial Officer, who will be a specialist in the study of native law and custom, cannot fail to be of advantage to the deliberations of the court, while the inclusion of Africans, whether as full members or as assessors, is surely a development greatly to be desired, not only as a means of enabling the African point of view to exercise its influence at a higher level than heretofore, but also as providing dignified and valuable occupation for the best of the body of trained Africans which it is the object of the proposals in regard to specialized education in this field to bring into existence.

Care would have to be taken to see that the Sessions Court was not less easily available to would-be appellants than the courts which it would replace.

The proposal that the court should " go circuit " should meet that requirement.

From the Sessions Court it is proposed that no appeal should lie, but the constitution of a Court of Revision is recommended consisting of (1) The Chief Justice or a Judge of the Supreme Court nominated by the Chief Justice; (2) the Judicial Adviser, who would be a member of the staff of the Supreme Court; and (3) the Chief Native Commissioner or an officer to be nominated by him (presumably an Administrative Officer of high seniority and great experience). Approach to the Court of Revision would be by way of case stated and it is suggested that the services of that court should be made freely available, but not in every case as of right on the application of a party dissatisfied with a decision of the Sessions Court.

The institution of such a court as the Court of Revision would have the effect of associating some of the Judges of the Supreme Court at the highest level with the administration of justice in the Native Tribunals.

Further proposals are that the Sessions Court might, at a later stage, have conferred upon it original jurisdiction in more serious cases and that an appeal should lie from it to the Court of Revision. It is also adumbrated as a possible development that eventually the Court of Revision might cease to have a separate existence, its jurisdiction being taken over by a Divisional Court of the Supreme Court sitting *en banc*. Should this take place, the effect would be that of the complete integration of the Supreme Court with the Native Tribunal system.

These are somewhat revolutionary proposals which will doubtless be the subject of much argument and contention. All that is justifiable to say here in regard to them is that they are of considerable interest and ingenuity and offer a possible means of reconciliation between the claims of the Supreme Court (which in the past has stood firmly on its rights as a court of unlimited jurisdiction) and the views of those who would have the Supreme Court entirely divorced from all participation in the administration of justice in matters arising in Native Tribunals.

In this Report Mr. Phillips has held the balance very fairly between the two schools of thought. He has produced a fine, constructive piece of work. The legislation which will doubtless follow its consideration will be awaited with considerable interest by all who have at heart the best interests of the natives of Kenya and who recognize in the Report a sincere and constructive effort to advance those interests in respect of a matter of the highest importance in the development and advancement of the indigenous people of Kenya.

THE DOCTRINE OF PRECEDENT IN CONTINENTAL LAW WITH SPECIAL REFERENCE TO FRENCH AND GERMAN LAW

[*Contributed by* D. K. LIPSTEIN.]

A CASUAL glance at present-day textbooks of Continental law might lead to the conclusion that a system of precedent, whether of a binding or of a persuasive character, is entirely unknown to Continental lawyers. However, a study of the history, the foundations and the substance of Continental systems of law shews that this conclusion, if unqualified, would be misleading. Such a study reveals, in addition, the reasons for which Continental law was unable to develop a specific doctrine of binding precedent and to recognize precedents as a source of law. If all these factors are considered, it will be seen that, from the point of view of substantive law, case law forms an important part of Continental law and is of persuasive authority, but that its formal place within a legal system

has not been determined satisfactorily.[1] For reasons of space and owing to a scarcity of material, it is proposed to examine mainly German law, but it is believed that the conclusions reached here apply *mutatis mutandis* to Continental systems of law in general.

1. Present Attitude of Textbook Writers.—Textbook writers are agreed that the only sources of French, Italian and German law are statute law and customary law. At the same time it is recognized that neither statute law nor customary law can offer express guidance in respect of every one of the manifold problems which the courts are called upon to decide. When confronted with gaps in the law, the courts must attempt to fill them, but it is emphatically denied by the overwhelming majority of writers that the courts, in supplementing apparent gaps, create new rules of law. The method of supplementing gaps has been carefully developed. The courts must find the appropriate rule of law by means of studying the purpose of the statutory provision which would be applicable were the facts of the case somewhat different. For this purpose they may employ the process of analogy and the *argumentum e contrario*, or they may rely upon the reports and debates of the Parliamentary Committee which drafted the statute. If all these means should fail, the courts must decide "according to sound discretion, having regard to all economic and ethical considerations."[2] This principle has found legislative sanction in article 1 (2) of the Swiss Civil Code, which provides: "If the statute does not contain an appropriate rule, the judge must follow customary law, and in the absence of the latter, he must decide according to the principle which he would enact were he a legislator. In so doing he must follow the recognized doctrine and practice."

But whatever rule the courts may find and apply in the case for decision, this rule does not become a rule of law for the sole reason that it is applied by a court, except in the exceedingly rare case where the court applies what it regards as a previously existing rule of customary law.[3] It is necessary, therefore, to ascertain the place of judicial decisions on a novel point of law.

2. Decisions of Courts and Customary Law.—From the 18th century onwards writers were agreed with few exceptions[4] that a single decision, resulting in a course of decision, if other courts follow suit, may lead to the establishment of a constant practice of the courts (*Gerichtspraxis*), notwithstanding the fact that an individual court is precluded from laying down general principles purporting to cover similar cases arising in the future.[5] In these circumstances, it is said, a customary rule of law may spring up which must be observed henceforth by all courts. No writer has been able to show at what stage and under what

[1] See e.g., Lambert, *La fonction du droit civil comparé*, I, (1903), pp. 153 ff. For a detailed list of the literature on this topic see Deák in (1934), 8 *Tulane Law Review*. 337, at p. 340, note 6; Duguit, *Traite de Droit Constitutionnel*, I (3rd ed., 1927), pp. 166-69; see also Pound in (1923) 36 *Harv. L.R.* 641, at pp. 647, 649. And see Henry in *A.B.A. Journal*, 15 (1929), p. 11; Gray in (1895) 9 *Harv. L.R.* 27; Von Moschzisker (1924) 37 *Harv. L.R.* 409; Winder in (1940) 56 *L.Q.R.* 457 and in *Journal of Criminal Law*, 5 (1941), p. 242; Comment (1941) 50 *Yale L.J.* 1448; Holdsworth in (1934) 50 *L.Q.R.* 180; Goodhart, *ibid.*, p. 196; Allen (1935) 51 *L.Q.R.* 333; Holdsworth, *ibid.*, p. 443; note in (1944) 94 *L.J.* 396; Kessler in *Tulane Law Rev.* 19 (1944), p. 32, at p. 51.
The following were not available:—Kocourek, *Renovation of the Common Law through Stare Decisis*, 24 *Ill. L.R.* 984; Borchard, *Some Lessons from the Civil Law* (1916) 64 *U. Pa. L. Rev.* 570; Moore and Oglebay, *Stare Decisis and the Law of the Case* (1943).

[2] Enneccerus-Kipp-Wolff, *Lehrbuch des Bürgerlichen Rechts*, I, 1 (30-34. ed. 1928), pp. 87-88. See also Lambert, *La fonction du droit civil comparé*, p. 16. For a good survey of French, Austrian, Hungarian, Swiss and German rules dealing with this question see Samuel in *Toronto Law Journal*, 5 (1943), p. 148.

[3] Enneccerus-Kipp-Wolff, *loc. cit.*, pp. 87-88; p. 119; Lambert, *La fonction du droit civil comparé*, pp. 144 ff. Gény II, *Methode d'Interprétation* (2nd ed., 1919); p. 45, n. 1; (ca. Planiol, Lambert), p. 261.

[4] For the views of some dissenting writers, see Gény, II, p. 66 ff.

[5] Gény, I, p. 210, II, p. 38; 72; Portalis quoted by Lambert, l.c. 164.

conditions a constant practice of the courts becomes a rule of customary law,[6] but it is significant that von Tuhr, writing in 1910,[7] brushed aside the suggestion that any one decision, or any course of decision of the German Supreme Court in respect of the Civil Code of 1900 had, at that time, obtained the force of customary law.[8]

Gény, on the other hand, writing in respect of French case law after the Civil Code had been in force for over one hundred years, admitted, without according case law the force of customary law, that it was necessary to treat it as " une règle de droit, vraiment obligatoire, comme issue de cette source formelle, la coutume."[9] Similarly, Lambert expressed the view that " . . . la jurisprudence est-elle l'agent nécessaire de la transmutation du sentiment juridique en normes de droit. Son intervention est indispensable pour métamorphoser les simples usages, les habitudes de commerce, les convenances, en véritables coutumes juridiques sanctionnées par l'ordre permanent d'exécution."[10] Going further still, Planiol and Ripert [11] stated that " les cours . . . reconstituent perpetuellement en dehors des Codes et des lois, un droit coutumier de nouvelle formation " but by adding that " le pouvoir judiciaire n'est jamais lié par sa jurisprudence antérieure " they rendered the preceding sentence practically meaningless, notwithstanding the proviso: " en fait il s'y conforme le plus souvent et la stabilité de ses décisions équivant *pour les particuliers* à l'existence d'une législation obligatoire " (italics mine).

Although it must be conceded that a single decision of a German, French or Italian court is not a binding precedent, it is nevertheless of high persuasive authority.[12] The reasons for this are three:[13]

First, a principle of mental economy leads judges to follow the opinions of their predecessors rather than to develop their own views, untrammelled by authority. Regard for the authority of other courts is also instrumental in bringing about a respect for precedents.

Second, legal certainty requires a uniform application of the same rules by

[6] Dernburg, Bürgerliches Recht, I (3 ed., 1906), p. 84, citing Kohler, *Lehrbuch des Bürgerlichen Rechts*, I, p. 112; Esmein, *Histoire Générale du Droit Francais*, I (1904), p. 27. Gierke, *Deutsches Privatrecht*, I (1895), p. 179; Gény I, pp. 331, 337, note, p. 445, note 4 with further references, but see p. 362; II, pp. 29 ff., p. 70 ff. Lambert, pp. 800, 802, 19, 143, 145, n. 3. It is interesting to note that the opinions on the function of case law expressed by judges and writers in England during the 17th and 18th centuries are strongly influenced by the doctrine of customary law as developed in Canon Law. See, e.g., the statements cited by Holdsworth, (1934) 50 *L.Q.R.*, 180.

[7] *Allgemeiner Teil des Bürgerlichen Rechts*, I, p. 47.

[8] It is believed that a body of such rules having the force of customary law has not been developed as yet in any one of the Continental legal systems. On the other hand, the courts have established many new principles supplementing statutory provisions. Even if the place of these rules cannot be adequately determined (see Gény, II, p. 3 ff., pp. 10, 32, Ancel in *Journal of Comparative Legislation*, 3rd Ser., XVI (1934), p. 1) an examination of their substance, preferably on a comparative basis, is much needed. It will show that the contribution of the courts is very considerable. See Gény, I, pp. 362, 370, 386, 402-3, 413-14, 416, 424, n. 2; II, p. 50; Vauthier in *Revue de droit international et de législation comparée*, 23 (1908), p. 247, at pp. 267-70. For studies on the development of law by the courts see e.g., Ripert, *La règle morale dans les obligations civiles* (3rd ed., 1935), and *Le régime démocratique et le droit civil moderne* (1936), by the same author.

[9] II, p. 51.

[10] Lambert, *loc. cit.*, p. 802.

[11] Planiol et Ripert, *Traité élémentaire de Droit Civil* (12th ed., 1939), I, p. 7; Josserand, *Cours de Droit Civil Positif Français*, I (3rd ed., 1938), p. 79, no. 99 (4); but see, e.g., Baudry-Lacantinerie et Houques Fourcade, *Traité Théorique et Pratique de Droit Civil*, I (3rd ed., 1907), p. 199, nos. 245 ff. Aubry et Rau, *Cours de Droit Civil*, I (6th ed., 1936, by Bartin), p. 241. Colin et Capitant, *Cours élémentaire de Droit Civil Français*, I (9th ed., 1939), pp. 36-39, no. 28.

[12] Gény, II, p. 47 ff.; *Laurette* v. *Sicard*, decided by the French Court of Cassation on March 11, 1884, s. 1884. 1. 288

[13] Von Tuhr, *loc. cit.*, p. 46; Planiol et Ripert, *loc. cit.*, p. 48, nos. 122 ff., p. 89, no. 204.

all courts of law. Reasons of expediency force the courts to take cognizance of previous case law, whether it emanates from higher courts or from courts of co-ordinate, or even of subordinate, jurisdiction.

Third, the decisions of the Supreme Court, although not of binding authority, exercise an influence not less marked than those of a court in a common-law jurisdiction.

3. Decisions of Supreme Courts of Appeal.—In Germany, two grounds may be distinguished which, together, established the preponderant position of the Supreme Court (*Reichsgericht*). First, by means of its jurisdiction in appeal, which enabled the Court either to quash a decision and to order a new trial or, in exceptional circumstances, to give final judgments (similar to the jurisdiction of the House of Lords), the *Reichsgericht* was in a position to impose its views upon the Courts of Appeal. For it would be indeed a stubborn Court of Appeal which would constantly refuse to accept the views of the Supreme Court and which would prefer to be over-ruled again and again in matters concerning the same question of law. The position is the same in those countries where the highest court exercises a jurisdiction of *cassation* whereby decisions of the lower courts can only be quashed and if quashed must be referred back for a new trial (e.g., France, Italy). This factual supervision of the legal development must not be under-estimated even if, from the point of view of judicial hierarchy, the Supreme Court (*Reichsgericht, Cour de Cassation*) cannot, as a rule, directly impose its views upon the great number of small courts of first instance against the decisions of which an appeal lies to the Court of Appeal of the district, which may be final (Germany) or not (France). Second, the doctrine of precedent was embodied, to a limited extent, in articles 136 ff. of the German Law concerning the Organization of the Courts (*Gerichtsverfassungsgesetz*).[14] According to this provision one division (civil or criminal) of the Supreme Court, if intending to dissent from a rule established by another division of the same court, must state a case for all civil or criminal divisions in joint session (since 1935 the Great Senates consisting of 9 judges). If a criminal division wished to deviate from a principle laid down by a civil division, or *vice versa*, all divisions (since 1935 the combined Great Senates) were to be summoned. By a similar provision, Courts of Appeal with a final jurisdiction in matters of land registration were forced to state a case for the Supreme Court, if they wished to disregard a decision on the same point of another Court of Appeal possessing the same jurisdiction in matters of land registration.[15] Although the concept of *sections réunies*, or *sezioni riunite*, is known in French[16] and Italian[17] law, the function of these plenary sessions combining the many divisions of the court is different, inasmuch as they are designed not so much to safeguard uniformity as to give additional weight to decisions of the Court of Cassation which has quashed a decision, referred it back and is seized with a second appeal. In fact, such decisions enjoy the highest authority and are usually followed without further discussion in subsequent cases.

It will be noted, however, that decisions of the Supreme Court, and for that matter of Courts of Appeal possessing final jurisdiction, are not binding upon lower courts. Not even the provisions which limit the power of any division of the German Supreme Court to dissent from any previous decision of another division of co-ordinate jurisdiction prevent (*a*) the division concerned

[14] For a more detailed discussion of this law prior to the reform in 1935 see Cohn in (1935) 5 *Cambridge L.J.*, 366.

[15] For proposals to the same effect with regard to Provincial Courts of Appeal in Canada see C.A.W. in *Canadian Bar Review*, 13 (1935), 183.

[16] Decree of 27 ventôse, an VIII, Art. 78; law of April 1, 1837, art. 1, 2. See Gény, II, p. 37; see e.g., the important decision of February 13, 1930, D. 1930. 1. 57 (strict liability in tort).

[17] *Codice de Procedura Civile*, Art. 547. See e.g., *De Meeus* v. *Forzano*, decided on January 18, 1940, *Foro Italiano*, 1940, I, p. 336 (diplomatic immunity).

from overruling any previous decision of its own or (*b*) the full court (or Great Senates) from overruling any previous decision given by the full court (or Great Senates). No rule exists similar to that laid down by the House of Lords in *London Street Tramways, Ltd.*, v. *L.C.C.*[18] Our conclusion is, therefore, that, as between divisions of the German Supreme Court and between German Courts of Appeal in matters of land registration, the binding force of precedent is recognized to a limited extent. In other Continental countries not even this restricted operation of precedent is recognized. Moreover, no court is bound by its own decisions, nor are lower courts under any obligation to follow previous decisions of higher courts.

4. Historical Background of the German Rule.—In order to stress the exceptional character of the provisions concerning the German Supreme Court, it may be convenient to give a sketch of the historical development which found its final expression in article 136 of the German Law concerning the Organization of the Courts. In the 18th century, the Supreme Court of the German Empire (*Reichskammergericht*)[19] and the *Oberappellationsgericht* of Kassel[20] were bound by their own decisions, but these decisions were not binding upon the lower courts. The Prussian Code of 1794[21] provided that judicial pronouncements should not be credited with any binding force, but this rigid rule was found to be unworkable and a decree of 1836 provided a procedure similar to that at present followed by the *Reichsgericht*. If a division of the Prussian Supreme Court (*Obertribunal*) wished to disregard a decision pronounced by another division of the same court, a case had to be stated for consideration by the full court. The ensuing judgment of the full court was binding upon all divisions of the *Obertribunal*, but not upon the lower courts.[22] On the other hand, the decisions of the local Supreme Courts of Appeal were given binding force also as regards the lower courts in Bavaria by the *Codex Maximilianeus Bavaricus* of 1756[23] and by a statute of 1837,[24] in Hanover by a statute of 1838,[25] in the jurisdiction of the *Oberappellationsgericht* of Jena,[26] in Austria by an order of 1850,[27] and in Brunswick by a law of 1853.[28] However, a decree of 1872 abolished the rule of *stare decisis* for Austria.[29]

II

5. Reasons for the Absence of a Doctrine of Precedent : The Reception of Roman Law.—The question must therefore be raised why a doctrine of precedent did not develop despite the appearance in Prussia, Austria, Bavaria, Hanover and elsewhere of provisions which in one form or another rendered the decisions

[18] [1898] A.C. 375.

[19] Stobbe, *Handbuch des Deutschen Privatrechts*, I (1871), pp. 6, 144, and note 6.

[20] *Regulation of 1746*, Stobbe, *loc. cit.*, pp. 144, 145.

[21] *Allgemeines Landrecht*, Introduction, par. 6; Stobbe, *loc. cit.*, p. 145; Dernburg, *loc. cit.*, p. 13; Savigny. *System des heutigen Römischen Rechts*, I (1840), p. 198; Gény, II, p. 59.

[22] The Prussian Supreme Court, like the German Reichsgericht, was thus given little scope for developing a doctrine of precedent.

[23] I, c. 2. par. 14; see Stobbe, *loc. cit.*, p. 145; Gierke, *Deutsches Privatrecht*, I, (1895), p. 177, note 3; Gény II, p. 59.

[24] See note 21.

[25] Stobbe, *loc. cit.*, Gierke, *loc. cit.*

[26] Rules of Organization and Procedure, 1816, Stobbe, *loc. cit.*; Gierke, *loc. cit.*

[27] Decree of August 7, 1850; Gierke *loc. cit.*; Samuel in *Toronto Law Journal*, 5 (1943), p. 148 at p. 153.

[28] Law of July 5, 1853; Gierke, *loc. cit.*

[29] Gierke, *loc. cit.* For the practice of the *Reichskammergericht* and of the higher courts of several German States in the early 19th century to give rulings (*Gemeine Bescheide*) on disputed questions of general importance see Wächter, *Handbuch des Württembergischen Privatrecht*, II (1842), p. 44. For *arrêts de règlement* in France before 1790 which fulfilled a similar function, see Gény II, p. 35, n. 1, p. 36; Lambert, *loc. cit.*, p. 166; Baudry-Lacantinerie, *loc. cit.*, I, p. 202, no. 247.

of a division of the Supreme Court binding either upon courts of co-ordinate or of subordinate jurisdiction. The answer will be found in the peculiar development of Continental law in the period between 1500 and 1800, the influence of the historical school[30] in the first half of the 19th century, the technique of interpreting statutes and the resulting modern approach to the theory of the sources of law.

There is a certain amount of evidence to show that during the early Middle Ages Germanic law, both in France and Germany, relied upon precedent, which was identified with custom, as the most important source of law.[31] But in the 15th and 16th centuries a "reception" of Roman law took place in Central Europe, as a result of which Roman law was superimposed upon national systems of law. Inappropriate rules, such as those dealing with slavery, were omitted, but Roman law in its final stage of development, as codified by Justinian, assumed the function of a Central European Common law. The deficiencies of such a "reception" are patent. Roman law of 533 A.D. was not capable of meeting the requirements of society in the 17th and 18th centuries. Moreover, not being a living system, it was not open to a further homogeneous development. These difficulties were overcome in Germany by the "method of construing" or "jurisprudence of conceptions." Roman law, which had become the law of the land, was presumed to be a complete system of laws covering all possible situations. It was only necessary to find, by means of interpretation and generalization, the rule of Roman law applicable to the particular case in question. It is clear that in such a system all creative power was denied to the courts whose sole task was to employ the mechanical process of judicial syllogism and to apply the general and abstract rules of Roman law to the facts of the case.[32] It is true that customary law was recognized as a source of law, but its validity rested chiefly upon the fact that the provisions of Roman law granted statutory authority to customary law. The interpretation and application of statutes were the principal object of practitioners and writers alike. This reliance upon the authority of statutes, whether it be express or implied, direct or delegated, barred the way to an independent consideration of previous decisions, and it is interesting to note that one of the foremost treatises of the late 18th century rejected categorically the suggestion that judicial pronouncements should be treated as binding.[33] How deeply this conception of the function of the judge remained rooted in the minds of German lawyers even during the 19th century can be gleaned from Windscheid's statement, in his well-known textbook, where he said: "It is essential to divide up conceptions into their component parts and to show the elements contained in them. . . . For not only a complete knowledge of the law, but also the certainty of its appli-

[30] See e.g., Ehrlich, *Fundamental Principles of the Sociology of Law* (transl. Moll, 1936), *passim.*; Lambert, *La Fonction du Droit Civil Comparé*, I (1903), pp. 107-174, Gény, II, p. 56 ff.

[31] Lambert, *loc. cit.*, pp. 717-798. Brissaud, *Cours d'Histoire générale du Droit Français Public et Prive* (1904), I, pp. 297-307; Esmein, *Cours élémentaire d'Histoire du droit Français*, (14 ed., 1925), p. 686 (for the territories living according to the *droit écrit*), 689 (*droit coutumier*); p. 704 ff.

[32] See also Goodhart, *Precedent in English and Continental Law*, (1934) 50 *L.Q.R.* 40, at p. 62, but on the ground that Roman law was a highly developed system. And see Esmein, *Cours élémentaire*, p. 686. For the influence, on this question, of the historical school upon Austin and upon American legal thought see Pound in (1923), 36 *Harv. L.R.*, 802, at p. 811.

[33] Glück, *Ausführliche Erläuterung der Pandecton*, I (2nd ed., 1797) pp. 218-224, pp. 440-492. For further references see Windschied-Kipp, *Lehrbuch des Pandektenrechts*, I (8th ed., 1900), p. 64, note 1.

For a somewhat different development in France prior to 1789 see Gény, II, p. 14. The paper by Meynial, *Remarques sur le rôle joué par la doctrine et la jurisprudence dans l'oeuvre d'unification du droit en France depuis la rédaction des coutumes jusqu'à la révolution, en particulier dans la succession aux propres*, read before the Congress of Comparative Law in 1900, was not available.

cation depends upon an exhaustive grasp of the contents of the conceptions embodied in legal rules. . . . The ultimate decision is the result of a calculation, the factors of which are represented by these legal concepts."[34]

6. The Influence of the Historical School.—In France the technique of rigidly restricting legal science to the application and interpretation of statute law established itself only in the wake of the introduction of the Civil Code of 1804, but the effect of this technique (that developed by the so-called " école des interprètes du code civil ") was not less marked than the corresponding practice which had grown in Germany under the ægis of Roman law.[35] With the advent of the historical school legal theory attached increasing importance to customary law. Savigny and his followers gave first place to customary law for the reason that, since in their view all law was based upon the " conviction (or consciousness) of the people,"[36] customary rather than statutory law represented the best expression of this conviction. However, the Historical School faced a difficult task, for it had to explain how the conviction of the people had embraced Roman law as the common law of the German States.[37] On the basis of its own theory the Historical School could have come to the conclusion that Roman law was not the common law of the German States, but this result was ruled out, seeing that Savigny's principal work was his treatise on the reception of Roman law in central Europe during the middle ages. In fact, the reception of Roman law was due, not to the " conviction of the people," but to the exertions of judges and of practitioners trained in Italy. Facts and theory were reconciled in the thesis first supported by the *glossa ordinaria*[38] that during the later stages of legal development courts and judges represent the " conviction of the people."[39]

Inasmuch as the Historical School rejected both statute as well as customary[40] law as the predominant legal source, it could have opened the way to a new appreciation of the function of the courts, but by relying exclusively upon the conscience of the people as the only source of law it excluded a proper understanding of judge-made law[41] which is not based on the assent or the belief of the people, but on force.[42] The flaws of Savigny's doctrine were exposed by Beseler (1843), who drew attention to the distinction between customary law (*Volksrecht*) and case law (lawyer-made law, *Juristenrecht*).[43] But in so distinguishing disservice was done to lawyer-made law, for in Germany the latter became finally identified with Roman law and with the special technique of interpretation outlined above. *Juristenrecht* was thereby identified with a system of abstract rules which was foreign by origin and which had been imposed by a body of learned theorists. It never became associated with the idea of progress and of organic legal development. Although the two schools differed with

[34] *Lehrbuch des Pandektenrechts* I, (6th ed. 1887) pp. 65 ff. (8th ed.), pp. 93-94; see also Jones, *Historical Introduction to the Theory of Law* (1940), pp. 68, 107. Present day Italian textbooks still adopt the same attitude.

[35] Lambert, *loc. cit.*, p. 206, note, contends that the English technique corresponds to that employed by the " école des interpretes du code civil." This statement is misleading. In Germany, soon after the introduction of the Civil Code, in 1900, a new wave of criticism arose against conceptualistic interpretation. See e.g., Heck in *Archiv für die Zivilistische Praxis*, 112 (1914), p. I ff., and the literature quoted there.

[36] For the various meanings attributed to this term and the many theories derived from it, see e.g., Zitelmann in *Archiv für die Zivilistische Praxis*, 66 (1883), pp.324 ff.

[37] See Kantorowicz, (1937), 53 *L.Q.R.*, p. 326, at p. 338.

[38] Lambert, *loc. cit.*, pp. 144 ff., especially at p. 153.

[39] See also Jones, *loc. cit.*, pp. 56, 60. For similar theories in Mohammedan Law see Lambert, p. 337.

[40] See e.g., Lambert, p. 141.

[41] Gény, II, pp. 58, 60 ff.; Lambert, p. 146.

[42] See e.g., the observations of Cézar-Bru in *Revue générale du droit, de la législation et de la Jurisprudence*, 28 (1904), p. 330, *et* p. 346.

[43] For a modern discussion of this distinction see Duguit, *Traité de Droit Constitutionnel*, I (3 ed., 1927), pp. 159, 160 ff.

regard to the sources of law they both rejected precedent as a source. Nevertheless, since Roman law texts expressed opinions on the function of judicial decisions, it was necessary, as a technical problem, to examine what place Roman law had allotted to case law.

Both supporters and opponents of the doctrine of precedent relied on D. 1. 3. 38,[44] and C. 8. 52. 1.[45] Savigny[46] noted, in connection with these texts, that *res judicatæ* were treated by the rhetors, although not by lawyers, as a source of law, but he, and with him the majority of writers,[47] rejected the view that these texts sanctioned the principle of *stare decisis*.[48] Further than this, they refused to accord any significance to the *mos judiciorum* (*Gerichtsgebrauch*), even in so far as it might affect the practice of subordinate courts.[49]

The question of the *mos judiciorum*, with special regard to the application of the principle of *stare decisis*, was considered in detail in 1840 in an article written by a leading authority,[50] but his conclusions were altogether negative. Should the principle of precedent bind the court alone which had pronounced the decision, should it bind courts of co-ordinate jurisdiction, or should judgments of higher courts bind the courts of subordinate jurisdiction ?[51] Was it conceivable that a constant practice of the lower courts could bind the higher court ?[52] Furthermore, assuming that a constant, although different, practice had arisen in the lower and in the higher court, could the law of the land differ according to whether the lower or the higher court was seized ?[53] For an English lawyer these questions do not appear to raise any difficult problems, and the answers provided by English law are clear.

But the writer of the article was unable to find a solution, and therefore inclined towards the orthodox view which held that the *mos judiciorum* was not binding upon any court, unless it had developed into a rule of customary law. He admitted, however that the *mos judiciorum* was of persuasive authority.

7. The Organization of the Courts and the Doctrine of Precedent.—One effect of precedent in English law, i.e., that a superior court is bound by its own

[44] *D. 1. 3. 38.* Nam imperator noster Severus rescripsit in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis optinere debere.

[45] *C. 8. 52. 1.* (a. 224) Praeses provinciae probatis his, quae in oppido frequenter in eodem genere controversiarum servata sunt, causa cognita statuet. nam et consuetudo praecedens et ratio quae consuetudinem suasit custodienda est, et ne quid contra longam consuetudinem fiat, ad solicitudinem suam revocabit praeses provinciae.

[46] Savigny, *System des heutigen Römischen Rechts*, I. (1840), p. 148 ff., and note (*h*), p. 136, and note (*r*), p. 173; p. 96, and note (*b*). The observations of Gray, (1895), 9 *Harv. L.R.*, 27, at p. 31, concerning the binding force of *decreta* are concerned with the legislative rather than with the judicial function of imperial *constitutiones*. See Wlassak, *Kritische Studien zur Theorie der Rechtsquellen* (1884), p. 134.

[47] Savigny *loc. cit.*; Wächter, *Handbuch des im Königreich Württemberg geltenden Privatrechts*, II (1842), p. 42, note 6, and the writers quoted there. *Contra*: e.g., Thibaut, *System des Pandekten-Rechts*, I (9th ed., 1846), par. 16, (pp. 14-15); Mühlenbruch, *Lehrbuch des Pandekten-Rechts*, I (4th ed., 1844), par. 41 (pp. 112/113), especially note 2. Some wished to accord binding force only to those decisions which had decided doubtful questions or cases for which no solution was provided by the courts. On the whole, modern writers incline towards Savigny's view. See Krüger, *Geschichte der Quellen und Litteratur des Römischen Rechts*, (2nd ed., 1912), pp. 103, 305; but see Jolowicz, in *Journal of the Society of Public Teachers of Law*, 1937, pp. 1-15; Collinet in *Etudes Gény*, I, pp. 23-31.

[48] They referred to C. 7. 45. 13 (a. 529); C. 1. 14. 11. (a. 474) and distinguished C. 1. 14. 12 (a. 529) as referring exclusively to decisions by the Emperor himself. For texts quoted by their opponents see C. 7. 45. 4 (a. 229); C. 4. 1. 12. 5 (a. 529; irrelevant); C. 8. 10. 3 (a. 224); C. 9. 35. 11 (a. 478; *Mos iudiciorum*).

[49] This doctrine has not been accepted. For Rome see Kaser, *Zeitschrift der Savigny Stiftung, Rom. Abt.*, 59 (1939), p. 52, at pp. 99-100; Lambert, *loc. cit.*, pp. 693 ff.

[50] Wächter, in *Archiv für die Zivilistische Praxis*, 23 (1840), pp. 432-46. For further literature see Lambert, *loc. cit.*, p. 150 ff.; Gény, I, p. 385.

[51] *ibid.*, pp. 439-40.

[52] *ibid*, pp. 440-43.

[53] *ibid*, pp. 440-41.

decisions, was excluded by the rigid Continental doctrine of the 19th century which refused to recognize any source of law other than statute and customary law. It should be remembered, however, that even in England the rule whereby the House of Lords and the Court of Appeal are bound by their own decisions is a product of the 19th and of the 20th centuries,[54] and that in the realm of Chancery the principle of precedent proper was only able to assert itself at a very late date.[55]

Another effect of precedent acknowledged in English law, viz., that the decisions of superior courts are binding upon the courts of subordinate jurisdiction,[56] was recognized in some German jurisdictions during the first half of the 19th century, but failed to obtain general support and was finally disregarded.

In view of these developments the absence on the Continent of precedent in the second sense is due, perhaps, not so much to the widely differing characteristics of English and Continental law[57] as to certain features of the judicial hierarchy.

First, a judicial hierarchy in the English sense did not exist in France up to the end of the 18th century and in Germany before the middle of the 19th century. Precedent in these circumstances would have meant numerous different bodies of precedent, each of which would have applied within a very restricted jurisdiction. As far as they emanated from courts administering Roman law or the *droit écrit* all these precedents, even if conflicting, would have purported to represent the law common to the whole country.[58] The picture conjured up here resembles to a marked degree that which Professor Goodhart

[54] *London Street Tramways Ltd.* v. *L.C.C.* [1898] A.C. 375; *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718; see also *Adair* v. *Birnbaum* [1939] 2 K.B. 149; Allen, *Law in the Making* (3rd ed., 1939), pp. 223, 226, n. 3, 273. Lord Wright in (1943) 8 *Cambridge L.J.*, 117-145; Salmond in (1900) 16 *L.Q.R.*, 377, at p. 340, note 3; Kotzé in *South African Law Journal*, 34 (1917), 280, at p. 296; Laird in *Canadian Bar Review*, 13 (1935), 1. For an interesting attempt to connect this development with the slowing up of the process of expansion in the era of liberalism, see Kessler in 19 (1944), *Tulane L.R.*, 32, at p. 50.

[55] Winder in (1941), 57 *L.Q.R.*, 245-279.

[56] For the practice in Scotland, which up to the 19th century developed on continental lines, compare Erskine, *Principles of the Law of Scotland*, I, 1 (1 ed., 1754), para. 17 (p. 7); *An Institute of the Law of Scotland*, (New ed., 1872), I, para. 47 (p. 20); Gloag and Henderson, *Introduction to the Law of Scotland*, (3rd ed., 1939), pp. 9-10; Gardner in (1940), 26 *A.B.A. Journal*, 774; (1940), 52 *Jur. Rev.*, 144, *ibid.*, 53 (1941), p. 132. For South Africa, see Kotzé, *loc. cit.*, at p. 311; Anders, *ibid.*, 27 (1910), at p. 372; Kovalsky in *South Africa Law Times*, 4 (1935), p. 95. For Canada, see Laird, *loc. cit.*, at p. 12. For Quebec, see Mignault in *Canadian Bar Review*, 3 (1925), p. 1; Kennedy in *South African Law Times*, 1 (1932), pp. 196, 197; for Louisiana, see Davidson in *Tulane Law Review*, 7 (1932), p. 100; for Mississippi, see Alexander in *Mississippi Law Journal*, 17 (1945), p. 170, at p. 176.

[57] English law shows that it is possible to combine a codification of a particular branch of law (e.g., Workmen's Compensation Acts) with the retention of the doctrine of precedent in the same field. See Allen, *loc. cit.*, p. 152; Goodhart, *loc. cit.*, p. 62. But see Pound in (1923), 36 *Harv. L.R.*, 641, at p. 647. Von Moschzisker in (1924), 37 *Harv. L.R.*, 409, at p. 422, and note 37, and Henry, cited above, note 1, for the disadvantages of combining these methods. It must be remembered that in accordance with Continental statutory technique and interpretation, courts applying civil law system deliver their judgments in terms of general propositions. Consequently, adherence to the principle of *stare decisis* would amount to the recognition of the power of the courts to modify the law to a far greater extent than that admitted in common law jurisdictions, at least in so far as the interpretation of statutes, as distinct from the implementation of gaps is concerned.

[58] All attempts in this direction were doomed in the absence of official or private law reports. It appears that law reporting was introduced in Germany in the middle of the 19th century. See Ehrlich, *loc. cit.*, p. 177 ff. For suggestions in this direction made by writers in the 18th century, see Savigny, *Vom Beruf unserer zeit für Gesetzgebung und Rechtswissenschaft* (2nd ed., 1828), p. 127. For France, see Meynial, *Les Recueils d'arrets et les Arretistes*, in *Le Code Civil*, 1804-1904, Vol. I. (1904), pp. 173-204. For an attempt by the German jurist Mynsinger (1514-88) to report the decisions of the Imperial Court, see Jones, *loc. cit.*, p. 45, note 2.

has drawn of the present position of precedent in the United States.[59] It is clear that in these circumstances a doctrine of precedent would have been unworkable.

Second, in the 20th century, when Continental law had become unified, codified and centrally administered, the great number of Courts of Appeal (26 in Germany, 27 in France) rendered the application of the doctrine of precedent difficult as far as these courts were concerned, and restricted it, within the limits of law and fact set out above,[60] to the decisions of the Supreme Courts. Otherwise, in the absence of guidance by the Supreme Court, conflicting decisions handed down by the numerous Courts of Appeal could have established different bodies of precedent which, although serving as a stabilizing factor within the jurisdiction of each Court of Appeal, would have endangered the uniform application of the law. The only possible alternative, that of attributing binding authority to the pronouncements of the Supreme Court, could have been adopted, although not without some difficulty, seeing that Continental Supreme Courts sit in many divisions.[61] That it has not been adopted may be due, in part, to the rigid doctrine regarding the sources of law, which also prevented the development of precedent in the first sense discussed above (p. 38). In part it may be due to an understandable reluctance to treat individual decisions turning solely on the interpretation of statutes on an equal footing with statutory and customary law. No such reluctance is felt where a course of decision has developed; case law then exercises its authority in no uncertain manner.

However, since Continental courts are concerned with the interpretation of statutes, and since the primary evidence for the existence of a rule of Continental law must be found in statutes, case law is principally of importance where the courts are called upon to fill apparent gaps in the statute which the legislature, intentionally or by oversight, has left for the consideration of the judiciary. Aided by very flexible systems of interpretation, the courts are well equipped to decide cases *primæ impressionis*. They have assumed this task with an ever-increasing eagerness and, as a result, the function of case law to create new rules outside statutory law has been more in the foreground than its rôle in applying and interpreting statutes.[62] It would be a mistake, however, to attach excessive significance to this feature when attempting to explain the absence of a fully developed doctrine of precedent.

III

Conclusions.—To sum up, the main reasons for the absence of a doctrine of binding precedent in the English sense are three. First, a different approach to the sources of law in consequence of the reception of Roman law has so far

[59] *Essays in Jurisprudence* (1937), pp. 50-74; see also Lambert, *loc. cit.*, p. 209, note, and the earlier literature quoted there.

[60] *supra*, pp. 6-9.

[61] Attempts to solve conflicts between the practice of the Supreme Court and the Courts of Appeal by reference to the legislation (*référé au législateur*) were made in France by a law of August 24, 1790, amended by a law of September 16, 1807, and abrogated by a law of April 1, 1837 (see above, p. 37, note 16); and in Naples. See Jones, *loc. cit.*, p. 53; de Ruggiero *Instituzioni di Diritto Civile*, I (5th ed., 1928), p. 128, and note 2; Planiol et Ripert, *Traité élémentaire*, I, p. 91, no. 210; see also Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (2nd ed., 1828), ff. 88-89, and the suggestions made by him at p. 131.

[62] Gény, II, p. 11. Consequently Continental writers have inclined either to stress unduly the binding force of precedent in English law or to over-estimate its creative force. See e.g., Gerland, *Englische Gerichtsverfassung*, II. (1910), pp. 771-773, 994; Esmein in *Revue trimestrielle de droit civile*, I (1902), p. 5, at p. 8; *Cours d'Histoire Générale de Droit Français*, I (1904), p. 27; Josserand, *Cours de Droit Civil Positif Français*, I (3rd ed., 1938), p. 80, no. 99; Lambert, *loc. cit.*, pp. 97 ff.; Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, I (9th ed., 1925), pp. 31-34, with further literature. See also Goodhart in (1934), 50 *L.Q.R.*, 44, at p. 54; Deák, *loc. cit.*, *supra*, note 1; Jones, *loc. cit.*, p. 297, note 4.

prevented the adoption of the principle in *London Street Tramways, Ltd.*, v. *L.C.C.*[63] In view of the doubts recently expressed in England whether the strict theory of precedent is justified,[64] it is unlikely that in years to come it will find many supporters on the Continent. Second, the adoption of the principle that courts of subordinate jurisdiction must follow the decisions of superior courts is rendered difficult, although not impossible, by the fact that Continental Supreme Courts of Appeal sit in many divisions. Third, in view of the great number of Courts of Appeal, the principle cannot easily be applied to Courts of Appeal and to other courts of subordinate jurisdiction without jeopardizing the uniform application of law rather than enhancing it.

FRENCH LEGISLATION IN EXILE

[*Contributed by* Dr. Benjamin R. Payn.]

Among the governments-in-exile which carried on the fight of their enemy-occupied countries during World War II, the Free French authorities are in a category *sui generis*. Whereas no problems at all, or comparatively simple ones, surrounded the recognition and functioning of the other governments-in-exile[1] the position of the Free French was complicated by the continued recognition of the Vichy régime. It is therefore not surprising that an important part of the legislative efforts of the Free French should have centred around the problem of defining their own powers and obtaining full recognition—a status which in the case of the other governments-in-exile was a starting point, not a goal.

1. *Governmental Organs.*

The birth of the Free French movement dates back to June 18, 1940, when General de Gaulle issued his famous proclamation: "France has lost a battle! But France has not lost the war."[2] At its inception the Free French movement was mainly a military undertaking. Its scope and character were defined in a memorandum of agreement of July 1, 1940, between the Prime Minister and General de Gaulle, annexed to an exchange of letters dated August 7, 1940:

> "General de Gaulle is engaged in raising a French force composed of volunteers. This force, which includes naval, land and air units and scientific and technical personnel, will be organized and employed against the common enemies. This force will never be required to take up arms against France."[3]

Very soon it became obvious that the scope of the Free French movement

[63] [1898] A.C. 375.

[64] Lord Wright in (1943), 8 *Cambridge L.J.*, 117, at p. 144.

[1] In the case of Greece, Luxembourg, The Netherlands, Norway and Yugoslavia, the presence of their Chiefs of State in Allied territory maintained the constitutional continuity of the respective governments-in-exile. As far as Belgium was concerned the constitution provided that in case of the King's inability to govern, the Cabinet would convene a joint session of both Houses for the designation of a Regent. In view of the enemy occupation of Belgium it was impossible to summon Parliament and full executive powers remained vested in the Cabinet. With regard to Czechoslovakia full recognition by the British Government was obtained on July 18, 1941. The constitutional continuity of Poland had been maintained by the designation of a successor to the Presidency before President Moscicki resigned and crossed the border to Rumania. See for more details on this subject the various articles which appeared in this Journal: Dr. Egon Schwelb, *Czechoslovakia : Legislation in Exile*, November, 1942, pp. 120 ff.; Dr. Manfred Lachs, *Polish Legislation in Exile*, November, 1942, pp. 52 ff.; Dr. Heinz Fayat, *Belgium : Legislation in Exile*, November, 1943, pp. 30 ff.; also F. E. Oppenheimer, *Governments and Authorities in Exile*, in *The American Journal of International Law*, October, 1942, pp. 569-571.

[2] *Journal Officiel de la France Libre*, January 20, 1941, p. 1.

[3] Great Britain, Foreign Office, France, No. 2 (1940), *Cmd.* 6220 and *Journal Officiel de la France Libre*, January 20, 1941, p. 2.

could not remain restricted to purely military responsibilities. Since modern warfare demands the total mobilization of all resources of a nation, the character of General de Gaulle's movement was bound to broaden into all fields of governmental activities. This inevitable trend was hastened by the shifting of the allegiance of certain colonies from Vichy to de Gaulle. By the end of November, 1940, the Free French had gained effective control over an area of approximately 1,250,000 square miles, or about one fourth the size of the French Empire, comprising such strategically important territory as French Equatorial Africa, the Cameroons and the island of New Caledonia in the Pacific.

The Council of Defence of the Empire.—Since the foremost concern of the Free French, in those fateful days of 1940, was to save their Empire for the Allied cause, General de Gaulle's first legislative act was the creation of a Council of Defence of the Empire by an Ordinance of October 27, 1940, on the organization of the public powers during the war.[4]

The first article of the Ordinance provides that the public powers will be exercised on the basis of the legislation ante-dating June 23, 1940, as long as freely elected representative institutions could not be restored. The second article institutes a Council of Defence of the Empire charged with the mission of "maintaining fidelity to France, watching over her external and internal security, directing the economic activity of the Empire and fostering the moral cohesion of its populations." Article 3 stipulates that the attributions of the Council are of a merely advisory nature. Final decisions are made by the *Chef des Français Libres*. Other articles deal with the administration of the Empire, which is entrusted to Chiefs of Division, and with the creation, at a future date, of judicial institutions charged with the functions which normally belong to the *Conseil d'Etat* and the High Court of Justice.[5]

On the whole this Ordinance did not limit General de Gaulle's discretionary powers. Nevertheless it reflected his desire to have an advisory body to share in his responsibilities of judgment, if not of decision.

Simultaneously with the promulgation of the Ordinance a statement of principles was issued under the title *Manifesto of October 27, 1940, pertaining to the direction of the French war effort.* The passages which explain and justify de Gaulle's assumption of power read as follows:

> "France is going through the most terrible crisis in her history. Her frontiers, her Empire, her independence, nay, her very soul, are threatened with destruction.
>
> "Yielding to inexcusable panic, some political adventurers have accepted and bowed to the law of the enemy. Nevertheless there are innumerable signs that the People and the Empire do not accept the horrible servitude. Millions of Frenchmen or French subjects have decided to continue the war until liberation is won. Millions and millions of others, in order to join them, are only waiting for the emergence of leaders worthy of this name. There is no regular French government in existence. Indeed, the organism located at Vichy which claims this name for itself, is unconstitutional and under the orders of the invader. In its state of servitude this organism can only be and is only a tool in the hands of France's enemies used against the honour and the interests of France. It is therefore necessary that a new power assume the charge of directing the French war effort. Circumstances are imposing this sacred duty upon me. I shall not eschew it."[6]

No attempt is being made in this manifesto to justify de Gaulle's mission on other grounds than the national emergency and the treachery of the Vichy

[4] *Journal Officiel de la France Libre,* January 20, 1941, p. 3.

[5] A High Court of Justice was instituted much later by an Ordinance of November 18, 1944 (*Journal Officiel de la République Français,* November 19, 1944, p. 1382) as amended by a law of December 28, 1945.

[6] *J.O. de la France Libre,* January 20, 1941, p. 3.

authorities. A legal justification of de Gaulle's leadership is contained in the *Organic Declaration completing the Manifesto of October 27, 1940*, promulgated at Brazzaville on November 16, 1940.[7]

This document refers to the peculiar circumstances under which the Constitution of 1875 was revised and shows that the revision constituted a violation of both its spirit and letter. The *de facto* authorities of Vichy are therefore illegal and France is without a lawful government. Since there is a state of war between France, and Germany and Italy, the Organic Declaration reasons, it is absolutely vital that a central power should direct the French war effort. For obvious reasons this central power cannot be established in conformity with the constitutional provisions. As a safeguard it is therefore necessary that the nature of the central power be essentially temporary, whence the solemn pledge to account for all acts to the legitimately constituted representative authorities, as soon as free elections will be practicable.

The French National Committee.—Hardly a year had passed since the creation of the Council of Defence of the Empire when the intensification of the war made a reorganization of the Free French governmental organs desirable. On September 24, 1941, an Ordinance was promulgated creating the French National Committee headed by General de Gaulle and comprising eight commissioners in charge of the various ministerial departments.[8] The creation of the French National Committee marked a decisive step towards the establishment of a central governing body in charge of all French interests. Whereas the terms of reference of the Council of Defence of the Empire were limited to colonial and military questions, the structure and functions of the French National Committee followed the traditional pattern of French governments. All Ordinances were to be deliberated upon in Committee sessions and promulgated by its President. They were to be countersigned by one or several of the National Commissioners. At the first opportunity they were to be submitted for ratification to the national representative institutions. The functions formerly held by the ministers of the Third Republic were taken over by the National Commissioners, who were directly responsible to the President of the Committee. Foreign diplomatic representatives were to be accredited to the President of the National Committee and the diplomatic representatives of Free France to foreign powers were to be nominated by decree and accredited by him.

The Council of Defence of the Empire was not abolished by the Ordinance of September 24, 1941, but continued to act as an advisory body on colonial and military matters.

While the formation of the French National Committee brought General de Gaulle closer to the exercise of regular governmental powers it also enabled him to break away from the necessity inspired one-man rule and share his responsibilities with a group of like-minded friends. The same tendency is emphasized in Article 9, which provides for the creation, at a future date, of a Consultative Assembly intended to furnish the National Committee with "as comprehensive as possible an expression of the national opinion."

Free French become Fighting French.—A decisive event in the development of the Free French movement was its fusion with the Resistance organizations of Metropolitan France. For some time secret negotiations had been going on between emissaries of French Trade Unions and Resistance groups on the one hand and officials of the French National Committee on the other hand. In a May Day message French Trade Unionists acknowledged General de Gaulle as the representative of the French people. "Though his army is small in numbers," the message addressed to fellow Trade Unionists at large said, "an immense army in chains is behind him in France."[9]

[7] id. p. 4.

[8] *J.O. de la France Libre*, October 14, 1941, pp. 41, 42.

[9] *Texts and References of Fighting France*, compiled by Andre Morize, Fighting French Press and Information Service, New York, p. 40.

On June 24, 1942, General de Gaulle announced his agreement with the principal Resistance forces of Metropolitan France who had rallied to him in return for his pledge to restore France's independence, democratic institutions and traditional ideals of liberty, equality and fraternity.[10]

By the merger with the French Resistance movements Free France found herself enlarged to include Captive France, and by the same token it was felt by the Free French leaders that the name of the movement was no more adequate. Therefore, in a communication dated July 29, 1942,[11] the French National Committee announced that after consultation with the British Government it had decided to change the name of Free France to Fighting France, thus uniting all French Resistance movements inside and outside of Metropolitan France.

French Committee of National Liberation.—The next step on the road to full governmental authority was taken on June 3, 1943,[12] with the promulgation of an Ordinance creating the French Committee of National Liberation under the joint chairmanship of Generals de Gaulle and Giraud. After five months of divided authority and a good amount of friction between the two Generals, Giraud, whose active co-chairmanship had already been curtailed by his appointment to the purely military functions of Commander-in-Chief, resigned from the French Committee of National Liberation and de Gaulle emerged as the sole and uncontested leader of patriotic France.

Provisional Government of the French Republic.—With the liberation of Algeria it had become possible for the Free French to transfer their seat to, and claim both *de facto* and *de jure* jurisdiction over, a territory which administratively is considered as much part of France as any department of European France. The prestige of the French Committee of National Liberation as the central governing power of France and her Empire seemed sufficiently established to allow it on June 3, 1944,[13] exactly one year after the formation of the French Committee of National Liberation, to follow a resolution of the Provisional Consultative Assembly and assume the name of Provisional Government of the French Republic.

2. Recognition of the Free French Authorities and Foreign Relations.

Relations with Great Britain.—The first and most limited form of recognition of General de Gaulle was expressed by Prime Minister Churchill in the exchange of letters referred to above.[14] While Mr. Churchill's letter referred specifically only to the creation of a French Volunteer force, it also recognized General de Gaulle as "leader of all Frenchmen, wherever they may be who rally to you in support of the Allied cause." Soon after the creation of the Council of Defence of the Empire, Mr. Winston Churchill defined the position of his government in a letter to General de Gaulle, dated December 24, 1940:

> "... I now take the opportunity of informing you that His Majesty's Government in the United Kingdom will be happy to treat with you, in the capacity of Leader of Free Frenchmen in which they have recognized you, and with the Council of Defence established by the Decrees of October 27, 1940, on all questions involving their collaboration with the French overseas territories which place themselves under your authority, both in matters affecting the association of the Free French Forces with His Majesty's Forces in prosecuting the war against the common enemies, and in those affecting the political and economic interests of those territories."[15]

As a direct consequence of this recognition several commercial agreements were signed between the British Government and General de Gaulle. On January

[10] *ibid.*
[11] *J.O. de la France Combattante,* August 28, 1942, p. 52.
[12] *J.O. de la Republique Français,* June 10, 1943, p. 1.
[13] id. June 8, 1944, p. 449.
[14] See page 44.
[15] Reference to this letter is made in the *Cmd.* papers 6249 and 6281 mentioned in footnotes 16 and 17.

21, 1941,[16] and May 20, 1941,[17] two agreements were concluded in reference to commercial relations with the Cameroons and French Equatorial Africa. Another agreement of importance was signed on March 19, 1941,[18] the object of which was to establish certain rates of exchange, provide for an autonomous budget and supply credits covering the Free French war activities.

In addition to these agreements a convention on the military jurisdiction of the Free French in the United Kingdom and other territories under British control was signed on January 15, 1941.[19]

After the formation of the French National Committee, the viewpoint of the British Government did not undergo any change with regard to the degree of recognition. On November 26, 1941, Mr. Eden defined the British view of the French National Committee as " . . . representing all Free Frenchmen wherever they may be, who rally to the Free French movement in support of the Allied cause." He continued that the British Government " will treat with the National Committee on all questions involving their collaboration with the Free French Movement and with the French overseas territories which place themselves under its authority."[20]

The formation of the French Committee of National Liberation was acknowledged by Prime Minister Winston Churchill in the following terms, in a statement of August 27, 1943:—

> " . . . His Majesty's Government in the United Kingdom recognizes forthwith the French Committee of National Liberation, as administering those French overseas territories which acknowledge its authority and as having assumed functions of the former French National Committee in respect of the territories in the Levant. His Majesty's Government in the United Kingdom also recognizes the Committee as a body qualified to ensure the conduct of the French effort in the war within the framework of inter-Allied co-operation.
>
> " They take note, with sympathy, of the desire of the Committee to be regarded as a body qualified to ensure the administration and defence of all French interests. It is the intention of His Majesty's Government to give effect to this request as far as possible while reserving the right to consider, in consultation with the Committee, the practical application of this principle in particular cases as they arise. . . . In respect of certain of the territories under administration of the Committee, agreements already exist between French authorities and United Kingdom authorities.
>
> " The creation of the French Committee of National Liberation may make it necessary to revise these agreements, and His Majesty's Government in the United Kingdom assumes that pending their revision all such agreements concluded since June 1940, except in so far as these have been automatically made inapplicable by the formation of the French Committee of National Liberation, will remain in force as between His Majesty's Government in the United Kingdom and the French Committee of National Liberation."

After the establishment of the Provisional Government of the French Republic a considerable amount of controversy continued to exist between two schools of thought. While a very large sector of public opinion, both in the United Kingdom and United States, demanded an immediate full recognition of de Gaulle's Provisional Government, the official attitude of Downing Street and the White House was to withhold full recognition until unmistakable proof of the will of the French People would be furnished. Finally, on October 23, 1944, the

[16] Great Britain, Foreign Office, France, No. 1 (1941), *Cmd.* 6249 and *J.O. de la France Libre*, February 25, 1941, p. 12.
[17] id. June 28, 1941, p. 28, and France, No. 2 (1941), *Cmd.* 6281.
[18] id. April 29, 1941, p. 20.
[19] *J.O. de la France Libre*, February 25, 1941, p. 12.
[20] November 26, 1941, in 376 *Parl. Deb. H.C.*, p. 727.

British Government recognized de Gaulle's administration as the Provisional Government of the French Republic, simultaneously with the United States and Soviet Governments.

Relations with the United States.—In spite of certain unfortunate incidents, such as those resulting from the occupation by the Free French of the islands of St. Pierre and Miquelon, and the much-publicized coolness between General de Gaulle and President Roosevelt, the relations of the Free French with the United States were on the whole cordial.

From the standpoint of practical importance the most significant act on the part of the United States Government was President Roosevelt's letter to Lend-Lease Administrator Stettinius of November 11, 1941, in which he declared that " the defence of any French territory under the control of the French Volunteer Forces (Free French) is vital to the defence of the United States."[21] He requested Mr. Stettinius to supply Free France with lend-lease equipment by way of re-transfer from Great Britain. This decision, which made the Free French eligible to receive American lend-lease, was later followed up by an exchange of notes of September 3, 1942, between the French National Committee and the United States, establishing the principles of reciprocal aid in the prosecution of the war.[22]

On October 6, 1942, President Roosevelt directed the Lend-Lease Administrator to remove from his previous instructions the provision for lend-lease " by way of re-transfer from His Majesty's Government in the United Kingdom or their Allies " and authorized him to arrange for lend-lease directly to the authorities of the French National Committee.

Other important dates in the relations between Washington and the Free French were March 2, 1942, when Mr. Sumner Welles, Under-Secretary for State, explicitly recognized the authority of the French National Committee over the French islands of the Pacific and in particular New Caledonia, and April 4, 1942, when a United States Consulate General was established in Brazzaville, capital of French Equatorial Africa.

On July 9, 1942, the United States Government appointed Rear-Admiral Stark and Brigadier-General Bolte as representatives to consult with the French National Committee in London on all matters pertaining to the conduct of the war.[23].

After the establishment of the French Committee of National Liberation, the United States Government extended to it on August 26, 1943, the same degree of limited recognition as that granted by Great Britain.

Relations with the U.S.S.R.—On September 26, 1941, Mr. Maisky, Ambassador of the U.S.S.R., recognized de Gaulle as Chief of the Free French wherever they may be and acknowledged the authority of the Council of Defence of the Empire. Although it was the last government to recognize the French National Committee, the Soviet Government also was the one which worded its recognition in the broadest terms. On September 28, 1942, a joint communique was issued in London by the French National Committee and the Soviet Government defining the French National Committee as " . . . the directing instrument of Fighting France, the only one qualified to organize the participation of Fighting France . . . and to represent in respect to the government of the U.S.S.R. French interests, especially as they are affected by the pursuit of the war."

Similarly the degree of recognition granted to the Free French after the formation of the French Committee of National Liberation was very far reaching. On August 26, 1943, the People's Commissariat of Foreign Affairs communicated the following note to the French Committee:

[21] *Department of State Bulletin,* December 27, 1941, p. 589.
[22] *Department of State Publications* 1847, Executive Agreement Series 273, and *J.O. de la France Combattante,* September 30, 1942, p. 55.
[23] Department of State release, July 9, 1942.

"The Government of the Union of Soviet Socialist Republics, having acquainted itself with the declaration of the French Committee of National Liberation, has decided to recognize it as the representatives of the State interests of the French Republic, and leader of all French patriots fighting against Hitlerite tyranny, and to exchange with it plenipotentiary representatives."

Relations with Other Allied Nations.—Shortly after the constitution of the French National Committee it was recognized by the governments-in-exile allied with Great Britain.

After the creation of the French Committee of National Liberation and after the formation of the Provisional Government, the Latin American countries, all governments-in-exile, and the Dominions either preceded or followed the great powers in granting the French authorities various degrees of recognition.[24]

3. *Political and Legal Institutions.*

The Provisional Consultative Assembly.[25]—The Provisional Consultative Assembly was created on September 7, 1943,[26] by Ordinance of the French Committee of National Liberation, as amended by the Ordinances of October 15 and December 6, 1943.[27] Two factors determined the character of the Consultative Assembly. On the one hand, it could not pretend to be a true representation of the French people, the majority of which was unable to express its will in free elections. On the other hand it had to include a sufficient number of various groups and tendencies to be more than a mere forum of discussion. The solution arrived at was to give a specified number of seats to the following groups:—

The National Resistance Council, comprising all French Underground Resistance organizations and delegates from the *Confederation Generale de Travail* and *Confederation Française des Travailleurs Chretiens*, as well as mouthpieces of the political parties of the Third Republic, was given the right to elect 49 delegates. Twenty members of the last pre-war French Parliament, elected in 1936, represented their colleagues in proportion to the strength of their respective political parties. The French Resistance groups outside France were given 21 seats in the Assembly. The *Conseils Generaux* of the liberated departments and colonies had 12 seats.

The Assembly was to elect its President and other officers, constitute its bureaux and Secretariat and establish its own rules. The presence of 40 members constituted a quorum. A far-reaching immunity from prosecution guaranteed to all members absolute freedom of action, vote and opinion. The rôle of the Consultative Assembly was to express its opinion on all questions submitted to it by the French Committee of National Liberation. Questions of budget and all matters involving loans of more than 500 million francs had to be submitted by the French Committee of National Liberation to the Assembly. Written questions could be submitted to the French Committee of National Liberation, which was obliged to give an oral answer, provided the question had been submitted not later than three days before the closing of the session. Ordinary sessions of the Consultative Assembly were to take place every two months. Extraordinary sessions could be called by the President of the Assembly upon request of at least two-thirds of the members or upon demand of the French Committee of National Liberation.

The working of the Provisional Consultative Assembly was an unmitigated

[24] For the official texts of the messages of recognition from the various governments, see *Free France*, Vol. 4, No. 5, pp. 187 ff., French Press & Information Service, New York.

[25] See for detailed discussion of the Provisional Consultative Assembly and the rules of the Assembly, *Free France*, Special Issue, No. 1, French Press & Information Service, New York.

[26] *J.O. de la Republique Française*, September 23, 1943, p. 139.

[27] id. October 21, 1943, p. 207, and December 16, 1943, p. 332.

success. Indeed, it was eloquent proof that the prestige of an Assembly may sometimes depend more on its democratic spirit than on strictly legal definitions of its powers. Although limited by its charter to an advisory capacity, the Assembly soon gained sufficient authority to impose its views on the French Committee of National Liberation, on questions of major importance. Thus, for example, the project for the organization of the French Government after the liberation of France, submitted by the French Committee of National Liberation was rejected and was replaced by a counter project of the Assembly which became law on April 21, 1944.

The Comité de Contentieux.—Article 4 of the Ordinance of October 27, 1940, provided for the creation, at some future date, of an organism which would take over, during the emergency period, the functions of the *Conseil d'Etat,* the highest French Administrative Court.

This pledge was redeemed on March 13, 1942, when the French National Committee (*Comité de Contentieux*) issued its Ordinance No. 25 creating a legal committee attached to the National Commissariat of Justice. On September 17, 1943,[28] the French Committee of National Liberation promulgated a new Ordinance repealing the one of March 13, 1942, and transferring the appeals standing before the *Comité de Contentieux* to a revised legal Committee of a temporary character.

4. *Overseas Legislation.*

Syria and Lebanon.—By far the most important legislative act in regard to the status of French possessions or mandates, was the statement of independence for Syria and Lebanon of September 28, 1941, and November 26, 1941, respectively,[29] following General Catroux' proclamation of June 8, 1941. Although this proclamation did not lead to an immediate *de facto* independence, it paved the way for an evolution which after considerable friction finally culminated in the participation of Syria and Lebanon in the San Francisco conference, thus symbolizing the complete independence and international maturity of these Levant States.

Algeria.—For many years the problem of granting French citizenship to the Algerian Moslems used to be one of the hotly contested issues of French politics.[30] The loyalty of the Moslem populations to France, even in the dark hours of June, 1940, raised again the problem of extending to the Moslems of Algeria the rights and privileges of French citizenship. The main obstacle against a sweeping measure modifying the political status of the Moslems was their special religious condition. For the Koranic Law conflicted with the French Civil Code on several points of which the most important was the Moslem institution of polygamy. Nevertheless, in view of the unquestionable loyalty of the Algerian Moslems to the French cause, General de Gaulle announced in an address delivered in Constantine on December 12, 1943, that a reform of the status of the Moslems was contemplated. A special committee, charged with the study of this problem, submitted its findings to the French Committee of National Liberation which adopted them in an Ordinance of March 7, 1944.

Whereas in the past Moslems eligible for French citizenship had to renounce expressly their personal status, the Ordinance of March 7, 1944, provided that "Moslem Frenchmen who have not expressly declared their will to be placed under the general rule of French law shall remain subject to the regulations of Moslem Law and Berber customs in so far as their personal status and property rights are concerned."

[28] *J.O. de la Republique Française,* September 23, 1943, p. 140.
[29] *J.O. de la France Libre,* December 9, 1941, pp. 51-52.
[30] For a detailed study of this question, see the article "Political Status of the Algerian Moslems" in *Free France,* Vol. 5, No. 1, pp. 20 ff, French Press & Information Service, New York, and Vol. 5, No. 8, pp. 282 ff, *ibid.*

By the new Ordinance certain specified categories of educated Moslems were declared French citizens. For other Moslems not eligible for automatic citizenship, the procedure of becoming French citizens was liberalized.

5. *Public Administration.*

Press Legislation.—One of the most serious concerns of the French authorities in Algiers was the reorganization of the French press after the liberation of France. In the first place there was the obvious necessity to purge the French newspapers from pro-fascists and pro-nazis. In the second place there was the well-known corruption of certain newspapers which during the Third Republic had so much contributed to discredit the French press as a whole. One of the reasons for the decadence of part of the French press was the dangerous custom, developed since the end of the last century, of accepting subsidies from various sources, as an incentive for certain editorial policies. Although this custom was much less widespread than generally assumed it placed the more independent newspapers at a financial disadvantage, which they thought to compensate by trying to increase their sales of advertising space. Unfortunately this made them dependent upon the omnipotent *Agence Havas,*[31] which exercised a complete monopoly over the French press. For it was not only the sole news service in France able to supply French papers with world wide up-to-date news, but also held the dual functions of "publishers' representative" for selling advertising on behalf of French newspapers and of advertising agent for French industrial and commercial firms as well as for the French government. This dual role, combined with its function as news distributor, gave Havas a position of power which was not of a nature to increase the standing and independence of French newspapers. Other methods of influencing the French press, from pressure groups to direct bribes, were also used whenever unscrupulous groups were trying to serve their own ends.

Under these circumstances the problem of reorganizing the French press, ousting pro-nazis, and at the same time maintaining the freedom of the press, was the task which faced the Provisional Government on the eve of the liberation of France. This task was met by a series of Ordinances[32] which established an independent News Agency, controlled advertising practices, abolished preventive censorship, gave protection against slanderous articles, provided for mandatory publication of ownership and financial conditions of the newspapers and eliminated those journalists from the press who had been found guilty of "national indignity" by collaborating with the occupants. The press legislation is contained in the following Ordinances:—

Ordinances of May 6, 1944, on press regulation in time of war and on the penalties for the violation of laws regulating the press.

Ordinance of June 22, 1944, on the distribution of information after the landings.

Ordinance of July 27, 1944, on the co-operatives of information.

Ordinances of August 26, 1944, on the organization of the French press and on national indignity.

Ordinances on a provisional administration of the Havas Agency, on the temporary creation of the Agency *France-Presse,* on the provisional administration of the *Messageries de Co-operative des Journaux Français,* and on the provisional rules governing the periodical press in liberated metropolitan territory, all promulgated from Paris on September 30, 1944.

Restoration of Republican Law.—Before concluding this extremely rapid and

[31] For the role of the Havas Agency, see Robert W. Desmond: *The Press and World Affairs,* New York-London, 1937, p. 57.

[32] Part of these ordinances were promulgated in Paris, but although they cannot be considered as exile legislation in the strict meaning of the term, they are mentioned in this article as part of the whole group of press ordinances. See for the texts the corresponding issues of the *Journal Officiel de la Republique Française.*

necessarily incomplete survey of French legislation in exile brief mention ought to be made of the French efforts to complete the full circle of return to the homeland by preparing for the task of restoring the time honoured republican institutions of France. The most important Ordinances on this transitional period were the result of two years of consultations with the French Resistance organizations, followed by deliberations of the Provisional Consultative Assembly. On March 5, 1944, an Ordinance was issued organizing a framework of administrative liaison with the Allies preparatory to the resumption of power by a French civilian administration. An Ordinance of April 21, 1944, provided for the organization of a civil administration in liberated France charged with the task of preparing for free elections at the earliest possible moment. The constitutional re-establishment of the Republic and the abolishment of the Vichy constitutional laws were accomplished by an Ordinance of August 9, 1944, on the restoration of the laws of the Republic in Continental France.[33]

THE FIRST INTERNATIONAL LABOUR ASSOCIATION: THE PASSING OF THE BRITISH SECTION

[*Contributed by* Miss Gertrude Tuckwell, C.H.]

In the summer of 1904, Dr. Bauer, the Director of the International Labour Association formed in 1897, visited England to gain this country's adhesion to the Society which, with its headquarters in Switzerland, had already several recruits among the nations. Its purpose was to further Labour legislation internationally and for that purpose to form branches in all countries, which should study and discuss between the biennial meetings held to decide on the Conventions to be pressed on their Governments for adoption and legislation. It was, as *The Times* stated, " the first systematic endeavour to create an international standard of Labour conditions."

Dr. Bauer came to Sir Charles Dilke, well known for his interest in industrial legislation, and to his wife, Lady Dilke, President of the English Women's Trade Union League. He and his projects were welcomed. In the next year—1905—he came again as they had arranged, but our great women's trade union leader was dead. As her niece and later the League's President, I took up the task of organizing the Branch.

The Sidney Webbs were interested at once and Lord Passfield, as he is now, promised to become chairman of the Executive of the new organization. He presided at the meeting summoned to elect it. The Executive was composed of various prominent Labour workers, among them Mr. Ramsay Macdonald and his wife, who was working hard for the Women's Labour movement; Dame Adelaide Anderson; Mary Macarthur, then Secretary of the Women's Trade Union League and an ardent worker, well known in the United States and here.

It was difficult to find a linguist, but Constance Smith, a student of industry, later to be Deputy Chief Inspector of Factories, came forward and attended all the international meetings, while Sophy Sanger, fresh from Cambridge, volunteered to act as secretary until she passed, some fifteen years later, to the staff of the International Labour Office, of which indeed the International Association was the true parent and forerunner. The funds consisted of a donation of £25, the contribution of Sir Charles Dilke.

Looking back, it seems as if it was rather an uphill struggle, for there was an inclination to be isolationist in those days, and the idea of the interdependence of nations has developed slowly in this country.

But gradually membership increased, an office was secured, a library formed,

[33] See for the texts the *Journal Officiel de la Republique Française* and *Free France*, Vol. 6, No. 7, pp. 254 ff., which also gives the texts of two ordinances on the punishments of collaborationists and the " purge " of the administrative services.

and the British Section was firmly established. A definite step forward was made in 1906 when an English edition of the periodical *Bulletin* of the (then) International Labour Office appeared, and it was decided to send a delegation to the biennial Conference at Geneva and a delegation *purement féminin* surprised the previously masculine representation. That feminine representation was important, for at Geneva in 1906 the Berne Conventions which prohibited night-work for women and procured the abolition of the use of white phosphorus, were discussed and finally framed. The Conferences of Lucerne (1908), Lugano (1910), and Zurich (1912) marked their progress, till the prohibition of the use of yellow phosphorus by 44 countries, colonies or protectorates, and of night-work (within the limits set by the Convention) by 25 sovereign countries or dependent territories was achieved.

During these years the work of the British Section was recognized by a Government grant (intended to defray the cost of the British Edition of the *Bulletin*), and the Government was represented at the Conferences by the Assistant Under-Secretary of State at the Home Office, well known for his work on the Opium Conference, and the Chief Inspector of Factories, Sir Arthur Whitelegge. Other countries sent Ministers, and Baron von Berlepsch, representing Germany, was a tower of strength, but it was not till Lord Samuel's tenure of office that the precedent of the British Home Secretary's attendance was achieved.

It is good to recall that as early as 1908, Constance Smith (supported by Mr. J. J. Mallon) introduced the vital question of wages in sweated trades, a difficult subject since Wages Boards even for sweated industries were regarded by the somewhat doctrinaire delegates of other countries as contrary to the laws of economics and therefore beyond the pale of possibility.

The Wages Board Bill, based on the Australian model, had been introduced for several years by Sir Charles Dilke. M. Vandervelde from Belgium and M. Arthur Fontaine from France came to give their support at one large London meeting. It was passed into law by Mr. Winston Churchill in 1908 by a "truce of God" in Parliament, and Minimum Wage proposals were prospering when in 1914 war broke out. Reference, too, should be made to the exhaustive Report on Child Labour which the British Section published, with marked success, in 1913.

The Association was dormant during the first World War but with the coming of peace all its implications were acknowledged and the International Labour Office which came into existence with the Treaty of Versailles is the direct and legitimate offspring of the work and vision put into the old Association.

In 1919 the International Labour Office staged its first Conference in Washington, and those who attended it as official delegates included many who had been prominently associated with the Association. Our Secretary was already at work on the Report which dealt with the Employment of Women and Children. Constance Smith, then on the Home Office staff, advised the Committee on a Maternity Convention which proposed the prohibition of work before as well as after childbirth, together with a cash benefit, to check the dangerously high mortality rate which had long been a cause of anxiety. (Unluckily the Convention has not in all these years been ratified by the United Kingdom, though its prospects seem brighter now.)

Not only had the war brought to a standstill temporarily the work of the International Association for Labour Legislation, and of most of the national sections, but also in 1919, when the official I.L.O. was established, it became clear that the functions and purposes of the I.A.L.L. would in future be very different. Two, at least, of its tasks had gone (that of securing International Labour Conventions between Governments, and that of issuing periodically the legislative series, volumes produced in several languages and consisting of the labour laws recently enacted in the different countries); its unique international

library of some 30,000 volumes had been acquired by the I.L.O.; and many of the officials of the National Sections of the Association had been invited to join the staff of the new official organization.

Nevertheless, the view was generally expressed that the need still existed for a specialized international organization of a non-official character able to present informal recommendations and criticisms to the official body. The British Section particularly had always aimed at being a centre of expert information, having for its business the focusing of public opinion upon problems of industrial legislation needing immediate international consideration, with Government action to follow. To this end it had been constituted a kind of federation of organizations concerned in such problems and of the various labour organizations in particular. Some such specialized knowledge, it was felt, would still be needful in the new circumstances, if public pressure were to be intelligently applied from time to time to the action of the State in bringing about the solution of international labour problems. By no one was this view more strongly expressed than by the first Director of the I.L.O., M. Albert Thomas, who regarded the existence of strong national sections of the I.A.L.L. as of importance and of great assistance to the I.L.O., above all during its early years. On its side the I.L.O. did everything in its power to give help and encouragement. Its London Office under its Director, Mr. Burge, was of special assistance to the British Section.

With the new tasks in view, the British Section reappointed its Committee with: Sir Thomas Oliver as President; Major J. W. Hills, M.P., Chairman of the Executive; Mr. Arthur Henderson, M.P., Treasurer; and with Lady Hall as Secretary. Delegates to the biennial Conference included Major Hills, the Chairman, who was elected to the Executive of the International Association, as was Lady Hall, long a worker for industrial betterment, and the wife of Sir Daniel Hall, the agricultural expert. A Parliamentary Committee was set up, comprising a large number of Members of Parliament of all parties under the Chairmanship of Lord Henry Bentinck, who interested themselves actively in all matters relating to the I.L.O. and who endeavoured to procure ratification of conventions for which the British Government had voted.

On the other side of its work, that of preparing the public mind by providing information upon international labour problems likely to be discussed by the I.L.O. in the future, the British Section proceeded by way of special committees. On these committees men and women with technical and expert knowledge gave their services, and during the years between the two wars more than twenty reports, dealing with one or other aspect of social security and conditions of labour in general, were issued. Four of these reports were concerned with problems relating to Hours of Work, the first, published in 1927, discussed in particular the experience of Great Britain on Output in relation to Hours of Work. Other reports on this subject appeared in 1933 and 1940, the last dealing specifically with the wartime problem of welfare and health in relation to hours of work.

The International Association for Labour Legislation since 1920 had become specially interested in the question of Unemployment and of Social Insurance, for at its first conference since the 1914-1918 War it had decided to amalgamate with two other international organizations doing complementary work to its own, the International Association against Unemployment (*L'Association international pour la lutte contre le chômage*) and the International Association for Social Insurance. At each subsequent Conference of the I.A.L.L. (as it is convenient to call it, though at this stage it renamed itself the International Association for Social Progress), these two subjects found a place in the Agenda and the contribution of the British Section was made available by various published reports. Such reports included Unemployment Insurance in Great Britain, Unemployment Insurance and Public Assistance, the Raising of the School Age in its relation to Employment and Unemployment.

Reports on Migration, the Policy of High Wages, The Liberty of Trade Unions and Professional Association, the Control of Credit in the Social Interest, etc., followed and in 1936, a Report was published on Nutrition.

In an attempt to simplify its cumbersome title and more accurately to define its purpose and status the British Section became the British Association for Labour Legislation.

The outbreak of the second World War confronted the Association with further problems. Closing down was again considered but it was felt that the fight of even one branch might help to strengthen the hands of those in a still more difficult position; and an assurance to that effect was given to the French correspondent, Max Lazard.

It was not long before frequent meetings of Sub-Committees in war-time London became impracticable. A Committee on Reconstruction, chaired by Sir William (now Lord) Beveridge, was able to pursue its work, but the majority of the Reports issued after 1940 were the work of single authors or pairs of authors. Seven such reports were published. They included National Health Services by Dame Janet Campbell, M.D., and Dr. H. M. Vernon; Hours of Work and their Influence on Health and Efficiency by Dr. Vernon; Education for Democracy; Revolution in the Colonies; Labour in the U.S.S.R.; The New I.L.O; and the last, The Nation's Children, a report written by Miss Rosalind Chambers, B.Sc., and Miss Christine Cockburn, M.A., giving a " brief, factual account of the provisions in England and Wales for the Welfare of Children."

But the end of the second World War has brought with it, for the moment, developments which seem to make the work of the Association unnecessary, in face of the United Nations Organization, the development of industrial institutions and the expansion of the International Labour Office. It seems fitting, at the end of a long series, that " The Nation's Children,"[1] just published, with a preface by Margery Fry, should be the last of the pamphlets. With this issue of a study of the present state of the law and its deficiencies, is presented certainly the most urgent question for international treatment. The passing of the British Section does not mean that the causes for which it fought have been won, but only that, in the circumstances of the time, new weapons and tactics are called for to secure the final victory.

THE NEW GREEK CIVIL CODE OF 1946.*

[*Contributed* by Professor PAN. J. ZEPOS, LL.D. (Athens).]

I

THE historical background of the Greek Civil Code shows how Greek Legal Science has at last been able to liberate itself from any preponderating foreign influence, whether of the French legal school or of the family of the Middle European laws.

French law, German law and even at one time English legal interpretation have played their part, sometimes a large part, in the evolution of Greek law during the last century. However, foreign law has always been the subject of severe criticism, and only now at last after this period of criticism have Greek lawyers been definitely able to draw up a Code free from any overriding foreign influence.

The history of the Greek Civil Code starts as far back as the first years of

[1] *The Nation's Children*, published by the British Association for Labour Legislation, 21, Clareville Grove, London, S.W.7. Price 9d.

* A lecture delivered on the 9th of May, 1946, at the invitation of the Faculty of Laws of the University of Cambridge.

the Greek Revolution of Independence against the Turks. A national assembly, the first National assembly of the Greek people in Revolution, held in Epidauros, decided on January 1, 1822, to charge a Committee of members of " well tried experience " with the task of drawing up Codes of Civil, of Commercial and of Criminal law, until the framing of which the civil and criminal laws " of our ever memorable Christian Emperors," i.e., of the Byzantine emperors, should remain in force.

In the years following the hopes of framing a Criminal Code were fulfilled while the French Commercial Code, already almost universally in force in the eastern basin of the Mediterranean, was also officially recognized as the Commercial Code of Greece.

The framing of a Civil Code, however, had to remain in abeyance until recently, and this for special historical reasons.

Byzantine Civil Law was for centuries after the fall of Constantinople to the Turks in 1453 in force among the Greeks, and thus it was this law which above all represented the genuine national civil law. Byzantine Law was not merely a romantic reminiscence. It was the national Greek Law under which enslaved Hellenism was ruled during many centuries. And Byzantine Law was deeply rooted in the hearts of the Greeks at the beginning of the last century, so that a codification of Civil Law could not mean more than a codification of the Byzantine Law then in existence.

Two other factors, however, exercised a strong influence upon the minds of the Greek lawyers of those times and seemed to be an obstruction to the speedy codification of the Byzantine Civil Law: the unquestioned splendour of the French Civil Code of 1804, and the teaching of Jeremy Bentham, the energetic utilitarian English lawyer.

The French Civil Code exercised a strong attraction on the Greeks in revolt. Many of them, the majority of the educated classes, had studied in France and were strongly influenced by the lucidity, precision and simplicity of the Code Napoléon. Moreover the rationalism at the root of the Greek Revolution was another factor which drove the Greek intellectuals of 1821 to follow the example of the French people, who some years before had shown their rationalistic spirit in their Revolution of 1789. The French Civil Code seemed then to the Greek lawyers the ideal model, which they had but to imitate.

On the other hand the activity of the utilitarian Benthamists, who came to Greece during the first years of the Greek Revolution, greatly attracted the Greek lawyers of those times, and was another factor which carried weight in their judgment. Colonel Leicester Stanhope, who came to Greece in 1823 as a representative of the Philhellenic Committee of London, was a passionate disciple of Jeremy Bentham's theories, which he tried by every means to introduce into Greece, then in a state of revolution. Jeremy Bentham himself was much interested in the case of the Civil Code of Greece and, either through Colonel Stanhope, or, of his own initiative, suggested to the Greeks the drawing up of a Civil Code Greek in origin. In the very interesting correspondence of Colonel Stanhope, published in 1824, we can read in many passages the utilitarian counsels given by the Colonel to the Greeks, while in a charming letter of Stanhope to Jeremy Bentham (of May 4, 1824, from Salona) we read as follows: " My dear Mr. Bentham, You desired me to write to you. Pardon my having so long delayed complying with your commands. I have presented your most valuable manuscript to the representatives of the Greek people. They received it with expressions of deep-felt gratitude, and promised me that they would consult it as their wisest oracle, and act accordingly. Monsieur Negris, who is the ablest man in Greece, and professes wise principles of government, is labouring at a Code of Laws. He says, that in order to make it palatable to the people he must make them believe that it is framed after the model of the Byzantine Code. I condemned this quackery and told him to read Dumont.

He then desired me to put him in correspondence with yourself. I promised to take this liberty, provided he would act up to your advice. He consented and I shall forward to you his letter. Were your code ready, it would, I think, be immediately adopted in Greece. Your works are known and admired here by the few who are educated . . . "[1]

Byzantine Law, i.e., the traditional national law of the Greeks, the French Civil Code and the attractive utilitarian theories of Bentham, were the three main authorities which exercised an influence upon the judgment of the Greeks at the time of their Revolution in drawing up a Civil Code.

After the Independence the Benthamist influence ceased to be active; so that there was a tendency to waver between the Byzantine and the French law system. However, there soon appeared a new factor on the scene, when King Otto and the Bavarian Regency were established in January, 1833.

By a Royal Decree of February 23, 1835, it was laid down that the civilian laws of the Byzantine emperors, which are contained in the Hexabiblos of Harmenopoulos (of 1345 A.D.) should be valid until the promulgation of the Civil Code " the drawing up of which had been already ordered."

Indeed at this time a Commission for the framing of a Civil Code was nominated, which during the following decades produced many drafts, some of which became statutes of the new Greek State. However, a complete Civil Code, which should embrace every aspect of civil relations, could not be promulgated, and this by reason of the strong influence of G. L. Von Maurer, a member of the Bavarian Regency and a distinguished lawyer, largely influenced by the theories of Savigny, the founder of the Historical School in Germany.

Maurer endowed Greece with more than one Code, e.g., the Criminal Code, the Criminal Procedure, the Civil Procedure and the Commercial Code. Faithful, however, to the spirit of Savigny's theory of "Volksgeist," he tried to collect the customary law of the Greeks and then to draw up a Civil Code in conformity with the " spirit of the Greek people " and with his own theories. He was, however, not able to carry out his plan, and so the problem of the Greek Civil Code was still without solution.

Through Maurer and the German lawyers who came and remained in Greece until 1862—some of them were also appointed Professors in the University of Athens founded in 1837—the influence of the German theories took root in Greece, and the German law spirit was gradually introduced—a new factor in the outlook of Greek lawyers.

II

The 19th century in Greece was a century of building up a State *de novo*, and the Greek lawyers, seeking for their model among the main codes of the Continent, successively hesitated between the French law, the Saxon, the Italian and later the German or the Swiss civil law.

It resulted from this that the Roman-Byzantine law has remained until recently the fundamental system of law, not, however, in the form of the Hexabiblos of Harmenopoulos, but, according to a broad interpretation of it by Greek lawyers, in the form of the Justinianean legislation with the subsequent amendments of later Byzantine times.

Unwritten law was another source of the modern Greek civil law.

In addition to this there were many more recent statutes which legislated for special institutions, especially in the law of persons and things, of hypothecs and pledge of movables, in family law and in the law of inheritance.

All these recent statutes were not always in harmony with the Roman-Byzantine system. And this harmony was further disturbed by the fact that in

[1] Colonel Leicester Stanhope, Greece in 1823 and 1824 (London, 1824), p. 196 et seq. A Greek translation of the book of *Dumont*, expounding the theories of Bentham was published in Athens (1834) by G. Athanassiou.

certain parts of Greece three different local Greek civil codes were in force until recently:—

(*a*) The Ionian Civil Code of 1841, formulated on the basis of the French Civil Code, the Code of the Kingdom of the Two-Sicilies and the "Statuta Veneta."

(*b*) The Civil Code of Samos of 1899 based upon the French, the Italian and the Saxon Civil Code, and

(*c*) The Civil Code of Crete of 1903, which included only General Principles, Law of Obligations and Law of Things, based for the most part upon the German Civil Code of 1900.

This was a mass of legislation for a little country! And however useful this mass of legislation was for the comparative method, to which Greek lawyers were of necessity accustomed, this intricate legislation caused many difficulties.

For this reason attempts were made to endow the country with a Civil Code and so to remove all these intricacies and difficulties. And it is a striking phenomenon of all these attempts that in each stage of their evolution a certain foreign civil code was almost the exclusive model; a fact which represents the tendencies of those times, but was also the reason for the failure of all those attempts.

Thus, after a simple translation of the French Civil Code into Greek, which appeared in 1836, a draft of a Civil Code appeared in 1874, based upon the French Civil Code, but showing also Italian and Saxon influence. Later, a new Commission, nominated in 1911, produced in the following years the drafts for many sections of a Civil Code, largely based on the German Civil Code, but showing also the influence of the French, Italian and Swiss civil codes and the Hungarian draft code of 1913. This Commission, however, was broken up in 1920 and so could not bring its work to a conclusion.

The drawing up of a Code was treated on fresh principles by the Law No. 4680 of 1930.[2]

According to this law two Commissions were appointed, one of five members for the drawing up of a Civil Code and another of twenty-five members for the revision of the draft of the first Commission.[3] The first Commission promulgated in 1930 a General Plan of its work. It was examined and criticised by the second Commission, and then the drafts of all the parts of the new Civil Code were published up to 1937. The Minister of Justice nominated in 1938 one of the five members of the first Commission to revise and co-ordinate the drafts of all the sections of the Code. This revision became, under Law No. 2250 of 1940, the Greek Civil Code.

By this law the age-long problem of framing a Greek Civil Code seemed to have been solved. Unfortunately a fresh crop of difficulties and problems soon arose!

According to its final article, this Code should have become operative on July 1, 1941. Greece, however, after a victorious war against Italy and a desperate struggle against Germany, was in the end overrun by the enormously superior forces of the enemy. The Government nominated by the enemy in Athens suspended the operation of the Civil Code, which, however, outside Greece became valid under the jurisdiction of the Greek Consulates, e.g., in Egypt. Thus the problem of the Civil Code took on a political or, rather, national character, which left its traces even after the liberation of Greece in 1944. Discussion arose whether the new Code ought to be revised or not, and ultimately it was decided that revision was necessary.

[2] See P. Vallindas in *Zeitschrift für Ausländisches und Internationales Privatrecht*, vol. 7 (1933), pp. 161-163, and Th. Macris, *ibid.*, vol. 9 (1935), pp. 586 et seq.

[3] The members of the first Commission were university professors and practising lawyers (C. Demertzis, C. Triantaphyllopoulos, G. Balis, G. Maridakis and P. Thiveos). In the second Commission the leaders of all the political parties, judges, lawyers, etc., participated.

By the Law No. 445 of 1945 the revision was entrusted to a Commission of three members, the President of the Areopagus and two Professors of the University of Athens. This Commission presented its draft and amendments, which were passed as the Law No. 777 of December 31, 1945. However, by a Royal Decree of May, 1946, this Law was repealed and the text of the Civil Code of 1940 was again adopted as the Greek Civil Code, which came into force retroactively as from February 23, 1946. This Law is the new Greek Civil Code of 1946, of which I propose to explain some of the main principles. It is the Code of 1946, because it came into force on February 23, 1946, just 111 years after the Royal Decree of King Otto of February 23, 1835, in which the drawing up of a Code was officially proclaimed and promised !

III

Already in its General Plan of 1930 the Commission for the drawing up of a Civil Code emphasized that it would base its labours on the Greek civil law as it then was in force in Greece, adding to it the rulings of the Greek courts and the considered opinions of Greek legal authorities. This point of view was further emphasized in all the Introductory Reports on the Civil Code. Thus, the Greek law in force until the advent of the Code was to be the fundamental source of the new Code. A wide comparative method was, however, also followed, in which all the modern codifications were consulted.

Indeed, the new Greek Civil Code is the result of the comparative study of the existing Greek civil law and modern civil legislation in other countries.

The scholar who would study this Code will find difficulty in classifying it under any one of the recognized distinct families of modern civil codes. It does not bear any relation to Anglo-American law. It does not belong to the family of Latin law, nor to the Scandinavian, nor, even at all points, to the family of the Middle European laws. It is true, however, that the latter have had great influence upon it. So that if the new Code *has* to be classified under one of the recognized families of civil law, it must be classified, although not without hesitation, under the Middle European law family, if only because of its indirect historical connection with this family and because of its technical resemblance to the codes of this family.

Indeed, the new Code sets forth basically the Greek civil law which was already in existence. This civil law, however, continued even until recently under the influence of the theories of the Pandectists of the last century, which, as far as the civil law was concerned, showed their codified formulation especially in the German Civil Code of 1900. Thus, indirectly, the new Greek Civil Code is connected with the German Civil Code.

Yet, the Greek Code contains provisions of substantive civil law and excludes the provisions of Commercial law, of Civil Procedure or Public Law. It contains 2,035 Articles and is divided into five Sections (" Books "), corresponding to the traditional five sections of the pandectistic theory: (*a*) General Principles, (*b*) Law of Obligations, (*c*) Law of Things, (*d*) Family-law, and (*e*) Law of Inheritance. Some relation to the German Code is obvious in this connection. However, the Greek Code differs essentially from the German.

Thus, the Greek Code includes Private International Law in the first section devoted to General Principles. The Greek Code, unlike the German, is simple and straightforward without a mass of references and quotations and is couched in a language comprehensible even to the layman. Lastly, many provisions and rulings of the Greek Code are completely different from the corresponding provisions and rulings in the German Code; and this difference will be brought out in the following exposition of some main principles of the new Code.

IV

The General Principles of the Code contain provisions relating to the sources of law, provisions giving the laws a future validity only and no retroactive force, and a general clause relating to " public order " to the effect that the rules of public order cannot be reversed by the will of an individual.

The General Principles contain further provisions relating to Private International Law. Thirty articles (art. 4–33) are devoted to this matter in the new Code, and these articles seem to represent the most recent result of an endeavour to formulate in statutory form the conception of a " Comparative Private International Law."

" Comparison is an indispensable preliminary to any project of codification " of Private International Law, as has been rightly emphasized recently by Prof. H. C. Gutteridge in a paper read in 1943 before the Grotius Society in this country.[4] And this indispensable preliminary was throughout observed by the framers of the new Greek Code. And it is not an exaggeration to say that the Private International Law of this Code was drawn up after a comparative study of all the foreign codifications, and that it constitutes the synthesis of the solutions given under the different laws in matters of Conflict of Law.

It is impossible for me now to give a detailed explanation of all the rules relating to Private International Law contained in the Greek Code. There are, however, some general principles which characterize these rules and to which I should like to draw your attention.[5]

Thus, all the rules relating to Private International Law are formulated, so to speak, in a " harmonious " form, i.e., they determine the law to be applied in every concrete case, whether this law belongs to the national or to a foreign legal system.[6]

Further, the cumulative application of two or more legal systems simultaneously in the same case has been eliminated in the Code, where the simpler way of the one-law system has been adopted. Thus, the proper law of the contract, if the parties have not determined beforehand the law to be applied, is to be found in the " special conditions " of the contract as a whole and not of each one of the obligations involved separately; or, in family law, the *lex patriæ* of the husband prevails in relations between the spouses and the *lex patriæ* of the father prevails in relations between parents and children, etc.

The most characteristic general principle, however, of the Private International Law of the new Code, at least in comparison with the Anglo-American system, is the persistence in the nationality system—a principle almost general on the Continent after its revolutionary introduction through the French Civil Code at the beginning of the last century.

This is not the place to argue about the advantages or the defects of both systems, the nationality or the domicile system, or, to use Prof. Beale's terminology, the " personal " or the " territorial " system.[7] Both systems have their advantages and their defects. However, for countries, such as Greece, from which large numbers of citizens emigrate, the nationality principle has a special significance, because its adoption is the only way of assuming some continuity in the tradition between the Greeks abroad, who constitute a precious part of the

[4] H. C. Gutteridge, *Comparative Law and the Conflict of Laws*, " Transactions of the Grotius Society " (1943), pp. 119 et seq., at p. 139. See also E. Rabel, *The Conflict of Laws : a comparative study* (Chicago, 1945).

[5] See G. Maridakis in *Zeitschrift für Ausländisches und Internationales Privatrecht*, vol. 11 (1937), pp. 111 et seq., P. Vallindas in *Archives of Private Law*, vol. 9 (Athens, 1942), pp. 170 et seq.

[6] See M. Wolff, *Private International Law* (1945), § 15, pp. 15 et seq.

[7] J. H. Beale, *A Treatise on the Conflicts of Laws*, I (1935), p. 52, Cheshire, *Private International Law* (1935), pp. 37, 39 et seq., *M. Wolff*, op. cit. § 97, pp. 102-104.

Hellenism now in the world, and their mother-country, Greece itself. Capacity, personal relations, family relations and the rules of inheritance are thus provided for under the nationality principle. And the domicile system is admitted only in the case of stateless persons (art. 30).

The Greek Code adopts a hostile attitude to the theory of " Renvoi " (art. 32) and this solution seems to be in accordance with modern tendencies, whether in theory or in modern codifications and conventions (e.g., in the Italian Civil Code of 1941 or in the Convention of Montreux of 1937), where the Renvoi is excluded. On the other hand, the so-called " aristocratic "[8] problem of qualification does not find a place in the Greek Code, since the framers of this Code emphasized in their Introductory Report that this problem cannot and should not be solved by a positive legal provision. The whole problem is a scientific one and perhaps it has not yet found its definitive form. That is, however, not the case for the " public order " problem, which has been so far greatly elaborated, and which has been formulated in the Code in a wide sense in the final art. 33 of the provisions concerning Private International Law.

This final article closes the rules relating to Private International Law of the Code. It may be open to discussion whether the first section of a Civil Code is the right place for the provisions of Private International Law. This branch of law acquired during the last decades an independent character in the systems of Law, so that obviously it requires an independent Code for itself. However, the long tradition since the *Codex Maximilianus Bavaricus Civilis* of 1756 has already connected the rules of Private International Law with the rules of a Civil Code, so that the placing of them in the introductory section of a Civil Code, as it happens in the Greek Code of 1946, already signifies an improvement, which, as such, is worthy of attention.

V

Among the provisions of the first Book of the Code, relating to the law of persons and to acts in the law in general, there are some rules worthy of special notice.

Thus the right of " personality " is recognized for the first time in Greek law by rules formulated mainly on the model of the Swiss Code (ZGB. 28, OR. 47, 49) and the decisions of the French courts (Greek Civil Code, art. 57 seq., 932, 1453, etc.).

Greek Law did not recognize a general right of personality (the *Persönlichkeitsrecht* of the German and the Swiss Law), until the advent of the new Civil Code; it was mainly only in cases of criminal acts that the defendant could claim so-called immaterial damages, whereas in civil cases the claim of immaterial damages was only allowed exceptionally, e.g., in cases of divorce or in the case of the *actio injuriarum æstimatoria.*

In effect, the problem of the right of personality is closely connected with the problem of the recognition of immaterial damages. Both institutions have had the same historical background and course. In the beginning they were institutions associated with criminality, and from this point of view the ancient Greek " *δίκη ὕβρεως* " or " *δίκη αἰκίας,*" etc., and the Roman *actio injuriarum* were especially characteristic. The *actio injuriarum æstimatoria* even in Justinianean legislation retained its criminal features, while in the same legislation immaterial damages seem also to have retained their association with criminality. It is only in modern times that immaterial damages were freed from any influence of criminality, and from this point of view the French court-practice of the last century has been the forerunner exercising a beneficent

[8] L. Merrigi, *Conflict of Law, Boston University Law Review*, vol. 14 (1934), p. 322, cf. A. Nussbaum in *Columbia L.R.*, vol. 40 (1940), p. 1469.

influence on German Law, and especially on the Swiss Code, which on the Continent is the most advanced in this matter.[9]

Immaterial damages and right of personality are closely and correctly connected in Swiss Law, and it need hardly be emphasized that the elucidation of the conception of immaterial damages has further elucidated the conception of the right of "personality" as being the right of protection to which every individual is entitled corporeally, intellectually and socially.

Now, it is exactly this wide and vigorous protection of personality of an individual which has been admitted in the new Greek Code—an improvement and a valuable addition to modern private-law theory.

The law of legal persons needs some special explanation.

Differing from the English system, the continental law of legal persons does not recognize the fundamental distinction between corporations aggregate and corporations sole. What especially characterizes continental law is the distinction between associations (or corporations) and institutions (or foundations).[10]

Corporations are associations of individuals, whereas by institutions is understood the sum total of property designed for a special purpose and organized as a separate legal person.

The main problem here is to show how these legal persons acquire their separate personality. And in this problem the continental theory led to acceptance of the so-called "organic" theory, especially elaborated by Gierke during the last century.

It seems now that this organic theory has also influenced the framers of the Greek Code, which gives (art. 61) the definition of a legal person as an association of individuals pursuing a certain aim or as the whole of a property designed to serve a certain purpose. The former is a corporation, the latter is an institution. The corporation acquires its legal personality by a judgment of the court, whilst the institution acquires its legal personality by a Royal Decree; both of them, however, corporation and institution, have a widespread capacity and are liable for contracts or torts of their agents committed in the course of their employment (art. 70 et seq.).

The theory of acts in the law is another topic of great importance.

Differing from the English system, continental law has elaborated a widespread doctrine of an act in the law and of the related idea of declaration of intention. Unilateral or bilateral acts in the law, their validity, the fundamental antithesis between the doctrine of "real intention" and the doctrine of "declared intention" (*Willenstheorie* and *Erklärungstheorie*), etc., are all problems which revolve around these inevitable conceptions of an act in the law and of a declaration of intention which the framers of the new Greek Code had also to face. They fulfilled their task by diligent investigation of the present state of these problems, which, obviously, cannot be dealt with here in greater detail. Some general observations may, however, be made on the theory of mistake and its effect on the validity of a contract.

Mistake has generally in the Code a greater effect on the validity of a contract than in English Law, and the influence of the pandectistic theory is apparent in this topic. However, several improvements have been achieved in the Code, as e.g., in the case of a mistake as to the quality of a thing or of a person, where the mistake has an importance as to the validity of the contract only if this quality, either according to the agreement of the parties or by the rules of good faith, is of a fundamental significance for the whole contract.

[9] H. C. Gutteridge, *The Comparative Law of the Right to Privacy*, L.Q.R., vol. 47 (1931), p. 203 et seq., and F. P. Walton, ibid, p. 219 et seq., P. H. Winfield, *Privacy*, L.Q.R., vol 47 (1931), p. 23 et seq., P. Zepos in *Archives of Private Law*, vol. 10 (Athens, 1943), p. 314 et seq.

[10] C. Simantiras in *Zeitschrift für Ausländisches und Internationales Privatrecht*, vol. 11 (1937), p. 761.

The last part of the first Book of the Code contains provisions relating to the exercise of rights, abuse of rights, self-defence and self-help.

These provisions do not present any special interest to the lawyer trained in comparative law, who knows the relevant provisions of the Swiss Code. Thus in matters of abuse of rights the Code (art. 281) provides that the law does not protect the manifest abuse of a right exercised in excess of the limits fixed by good faith or by *boni moris* or by the social or economic purpose for which the right is conferred. Here, the influence of the Swiss Code (art. 2) and of the Franco-Italian Draft of Obligations (art. 71) is manifest. The framers of the Greek Code adopted the theory of abuse of rights in its widest sense of continental development, so very different from the absolutist view of the Roman tradition and of the English system.[11]

VI

Book II of the Code (art. 287-946) contains the provisions relating to the law of obligations, either contracts or torts.[12]

Obligations may be called the kernel of Private Law in every country.

In England the triumph of the Common Law over the Roman Law led gradually to the supremacy of the doctrine of consideration in the law of contracts, and this doctrine retains its independent character even to-day.

Very different has been the evolution of the theory of obligation in general on the Continent, where contract, breach of contract and tort are all classified under the same Law of Obligations, which in modern times bears the seal and impression of the Roman tradition but has been greatly elaborated also by the teaching of the Canonists, of the scholars of the School of Natural Law, and of the more modern lawyers of the Continent.

Three main principles, as I believe, animate the body of rules relating to the Law of Obligations in modern continental law:—

(*a*) Freedom of agreement,

(*b*) The principle of good faith, and

(*c*) The principle of favour to the debtor.

Freedom of agreement, after the elaboration of the principle in the teaching of the Canonists and of the scholars of the School of Natural Law, was laid down for the first time, so far as I know, in the Constitution of the United States of 1787 (art. 7, sec. X), which ruled that " No State shall . . . pass any law impairing the obligation of contracts " . . . and afterwards in a clearer form in the French Civil Code of 1804 (art. 1134), which provided that: *" Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites."* This principle has undergone an intricate evolution in France, where the whole problem has been connected with the problem of " causa." It has been further subject in modern times to severe criticism and has suffered many limitations through the so-called *contrats d'adhésion* or *contrats de réglémentation* or *contrats collectifs* in the countries of the French law family, or through the so-called *Kontrahierungszwang* in Middle European countries.

The principle of good faith is derived from the conception of the Roman *bona fides;* it has, however, also been strongly influenced by Teutonic ideas.

Lastly, the principle of favour to the debtor, already recognized owing to Greek influence in the Roman Law, has in modern times increased in continental law, throughout the Law of Obligations, but more especially in contracts between workers or employees and their employers in the case of Industrial Law, where the tendency has been to protect the weak against the strong.

All this has contributed to broaden the idea of obligation in modern times.

The contract in favour of third parties is generally recognized on the Con

[11] See H. C. Gutteridge, *Abuse of Rights, Cambridge L.J.*, vol. 5 (1935), pp. 22 et seq.

[12] C. Triantaphyllopoulos in *Zeitschrift für Ausländisches und Internationale Privatrecht*, vol. 10 (1936), p. 53 et seq.

tinent, and in France the so-called *action directe*, i.e., the action of the creditor against the debtor of his debtor has gradually acquired a general significance in theory and practice. On the other hand, in the law of civil wrongs the tendency has been to recognize the general principle that any harm to a person caused intentionally or by negligence creates a liability in delict, whilst the conception of legal liability for an act has been developed in a much wider sense and tends to generalize concrete cases of strict liability under the title of *théorie du risque* in Latin countries, or of *Haftung ohne Verschulden* in Middle European laws. The problem has no little significance, and it seems that the Teutonic ideas of the distinction between *Schuld* and *Haftung* have, at least theoretically, mostly contributed to this interesting evolution.[13]

Now, the framers of the Greek Civil Code were fully aware of these new movements and tendencies around them on the Continent.

It would take too long to try to analyse these modern features of obligation in each special article of the Law of Obligations of the new Code. I shall confine myself, therefore, to emphasizing some special problems dealt with by the Greek Code, in order to show once again the strong comparative, but also independent, character of this codification.

The rules relating to the non-performance of contract remain to-day the crux of any discussion concerning the law of contractual relations between the parties. The Roman legacy in the matter is often misleading; and the theory of breach of contract in English Law, the theory of *inexécution du contrat* in France and of *Unmöglichkeit der Leistung* or *Leistungsstörungen* (*Verzug, Positive Vertragsverletzungen*) in Germany, did not seem satisfactory to the framers of the Greek Code, who, moreover, were also aware of the Draft concerning the *Leistungsstörungen* prepared by the Nazi-Academy of German Law in 1936.

The Greek Code is based on the healthy fundamental idea that any *culpable* violation of the obligation of the debtor leads to his liability. Thus a simple and general conception of non-performance emerges, which, based upon the culpa-principle, covers all the possible needs in contractual transactions. In this way, the debtor is liable in case of impossibility of performance, unless he proves that he is not responsible or culpable for this impossibility (art. 335 seq.). His liability is decided according to the general rules concerning the place, the time and the method of performance expected from him, and it is enforced by an action for specific performance or an action for damages. Thus, the Code gives a simple solution to the crucial problem of impossibility in an independent, and, perhaps may I say, in a successful way. The heavy and intricate pandectistic distinctions of so-called subjective or objective impossibility find no place in the Code. And the, more or less, simple ideas of delay in performance or of delay in acceptance of the duly offered performance complete the regulation of the whole problem (Greek Civil Code 335 seq., 349 seq.).

The Greek Code contains a provision relating, in particular, to the so-called "frustration" problem (art. 388). This problem, elaborated in such a masterly way during the last few years in this country,[14] was then approached, on the lines of the French *théorie de l'imprévision* and of the German conception of *Unzumutbarkeit*, with the help of general clauses, like good faith, justice and equity, applied in cases of supervening change of circumstances of an extraordinary and unforeseen character. Art. 388 of the Greek Code provides that if the circumstances, in which the parties were mutually agreed, have been changed owing to causes extraordinary and impossible to be foreseen, and as a result of this change of circumstances the obligation of the debtor has become very onerous, the court can, on application by the debtor, either limit his obligation or even annul part or the whole of the contract: a formulation

[13] P. Zepos, *Liability for civil wrongs of third persons*, (Athens, 1937), *passim*.
[14] See A. D. McNair, *Legal Effects of War* (2nd edit.), 1944, pp. 133 et seq.

based on the teachings of French and German literature and court-practice, which, however, is, to my mind, of doubtful advantage. Indeed, the doctrine of frustration is now to-day in full process of development not only in this country, but also on the Continent, so that it would be, if not difficult, at any rate unwise, to attempt to solve the delicate problems in their present unstable and fluid form by a general clause which might have dangerous consequences.

Among the different kinds of contracts which are provided for in the Code the contract of sale of goods is the most interesting.

Sale of goods is a contract which has been the subject of different regulations on the Continent, in the French and the Middle European law systems.

In the French Law system, followed by the laws of the majority of the other Latin countries, the contract of sale possesses this feature, namely, that the transfer of ownership is achieved by the simple consent of the contracting parties, although the goods have not yet been delivered nor the price paid (French Civil Code, art. 1138, 1583). This system, which in several points corresponds to the system adopted by English Law and the laws of the three Scandinavian countries, has been established in the French Civil Code after a chequered history, in which a large part has been played by the theory of *traditio ficta* and the teaching of the School of Natural Law, according to which ownership is a " moral " right which can be transferred only by the free will and consent of the parties. It is worth noting that this conception fundamentally is preserved in French Law also in the case of the sale of immovables, the *transcription* of which in official records means only that the transfer, already recorded, can be enforced also against third parties.

Sale of goods in Roman Law and in the systems of the Middle European countries has a different significance. Here " sale of goods " means the obligation existing between seller and purchaser, according to which the former is bound to deliver the goods to the latter. This delivery, however, is an independent obligation, or, as we say, a " real " contract. Here again differences arise: in some countries, e.g., Germany, this " second " obligation is completely independent of, or, as it is said, is " abstract " from the contract of sale; on the contrary in Austria and Switzerland (in the latter only in the case of immovables), a *justus titulus*, i.e., a valid contract of sale is required for the validity of the " real " contract—a solution which seems to be in accordance with the spirit of the Roman system and has been always the law in force in Greek theory and court practice.

Now, both systems, the French and the Middle European, were in force until recently in Greece, where the Roman Middle European system prevailed on the mainland and in the majority of the Greek islands, whereas the French system was in force in the Ionian islands and in the island of Samos under the rules of the French inspired local Civil Codes.

The new Code adopted in general the Roman system which distinguishes between the contract of sale, pure and simple, and the contract of transfer of ownership, which requires, however, the validity of the former for the validity of the latter. Hence the predominant right of the purchaser is to claim specific performance of the contract, namely, delivery of the goods, whereas the preponderant right of the seller consists in claiming the price. And it is in particular from this point of view that continental law differs from English Law, since in English Law the fact that a contract of sale of specific goods is sufficient to transfer the ownership without delivery, gives to this contract a character of warranty, which compels the seller to pay damages in case of non-performance.

This fundamentally different system in the Greek Code is further shown in all the delicate problems of the contract of sale of goods.

Thus the intricate problem of the passing of risk from seller to buyer could not be solved simply by the clause *res perit domino*, and therefore the Code

provides (art. 522 seq.) that the risk passes to the buyer with the delivery of the goods to him, which is an important change in the Greek law system, which until recently was governed by the mischievous maxim *periculum est emptoris* or *periculum est creditoris*.

The main obligation imposed on the seller consists, as has been said, in the transfer to the buyer of the ownership of the goods. Here also an improvement has been achieved: it is no more the *vacua possessio* as in Roman Law, but full ownership which the seller has to transfer. And this transfer of ownership is not merely formulated in the *habere licere* manner of the Roman tradition, but in the Code (art. 514) it is further provided that the seller has to transfer the ownership of the goods, free from any third-party rights, to the purchaser. Here, the whole problem of warranty of title and of warranty as to the quality of the goods delivered is formulated for the most part on the model of the German Civil Code, which in general reproduces the Roman system of eviction, or of rescission of the contract or of rebate in the purchase price or of damages in cases of defects in the goods sold. These solutions, however, although in full agreement with the traditional Greek (Roman-Byzantine) law, are not free from criticism. Even in continental theory the tendency is to assimilate the cases of warranty of title and of warranty for defects in the goods sold, as also to bring all these cases under the same general theory relating to the consequences of non-performance in contract.[15] And I must confess that these solutions are not only attractive by their simplicity, but also are in keeping with a progressive legislative policy.

I do not propose now to deal further with other special contracts comprised in the new Code, since it would be a lengthy matter and not always interesting, as their main principles represent basically the Roman tradition improved by wide comparative study, where Middle European Law, the French Civil Code, and the Franco-Italian Draft of a Law of Obligations of 1927 retain a preponderant place.

Indeed, I should like to close my sketch of the Law of Obligations with a few words on the treatment of civil wrongs (delicts or torts) in the Code.

Already before the advent of the new Code the Greek tribunals and the established case-law of the Areopagus admitted a wide interpretation of the rules contained in the Roman *lex Aquilia* in maintaining that any harm to a person caused intentionally or by negligence creates a liability for an unlawful act. Thus the gist of the famous art. 1382 of the French Civil Code was already in force in Greek case-law and theory even before the advent of the Civil Code. Hence the provision of this Code (art. 914) that all harm which is legally unjustifiable and is caused intentionally or by negligence is an unlawful act entitling the injured person to a claim for damages, has been a simple restatement of a fact already for a long time in force in Greek theory and practice. This broadening of the scope of delictual liability, a tendency which Professor Winfield has also stressed in this country,[16] is a common phenomenon in the modern laws of the Continent, where not only the idea of unlawful act, but also the doctrine of vicarious responsibility and the doctrine of strict liability have been widened. The development of the rule contained in the case of *Rylands* v. *Fletcher*[17] is highly characteristic in this country, and the growth of the doctrine of *responsabilité absolue ou objective* or of *Haftungen ohne Verschulden* on the Continent testify that we are on the threshold of a new development of the whole theory of responsibility in its relation to culpa.

The new Greek Code dealing with civil wrongs admits not only the general idea of the culpably committed unlawful act, but also recognizes widespread cases of strict or absolute liability. Thus the liability in relations between

[15] See A. Ligeropoulos in *Zeitschrift für Ausländ. und Intern. Privatrecht*, vol 12 (1939), pp. 75-101.

[16] P. H. Winfield in L.Q.R., vol. 51 (1935), pp. 249 et seq.

[17] *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330.

master and servant (Greek Civil Code 922), the liability for the acts of animals (C.C. 924), etc., are impregnated with the spirit of the new tendency towards strict liability. The whole question of civil wrongs is completed by provisions relating to seduction, defamation, etc., as well as to immaterial damages about which I have already had the opportunity of speaking above.

The law of obligations then ends with some articles (939–946) devoted to the question of fraud on creditors, where the Roman principles embodied in *actio Pauliana,* elucidated and improved, have been laid down. And in this connection it is worthy of notice here that the process of bankruptcy is only applied to traders under special provisions of the Greek Commercial Code.

VII

In the law of things contained in Book III of the Code (art. 947–1345) the Roman Law tradition and the improvements already displayed in modern Greek Law during the last century and, in particular, on the French model, are especially apparent.

Possession and ownership are in the Code distinct ideas. Possession, however, has been established on the simpler Roman model, as interpreted in the Greek case-law, and the complicated distinctions of the German Civil Code were definitely rejected.

Provisions, such as the provision that the owner cannot prohibit the act of a third-party performed above or under the soil if this act does not harm the owner's interests, or the provision recognizing the individual ownership of a flat (an institution already recognized by a statute of 1929), testify the development which the Roman conception of ownership has undergone in the new Code, while other provisions affecting the restrictions of the exercise of ownership show the acceptance of a modern conception of ownership in this Code.

The methods of acquisition of ownership are derived from the traditional Roman system, improved, however, in order to meet the needs of the transactions of to-day.

The acquisition of ownership by contract is established in a different way according to whether movables or immovables are concerned (art. 1033 seq.). The ownership of immovables is conveyed by contract which has to be officially recorded in the same way as in the *transcription* of the French Law. As far as movables are concerned, the conveyance of their ownership by contract presupposes their delivery. In both cases, conveyance of land or conveyance of movables, the general rule is that no one can make a transfer of goods who is not the owner. The Code, however, admitted an exception on the model of the Middle European Codes and in accordance with the claims of the principle of " good faith " in the case where the person who acquires the ownership of movables from a non-owner does so in good faith and the goods received have not been stolen from or lost by their owner (art. 1036 seq.). Money and negotiable instruments, however, may be acquired even if they are stolen from or lost by their owner—a rule corresponding to the spirit of facilitation of business and transactions, already basically recognized also in this country.

Provisions relating to acquisition of ownership by long possession(*usucapio,* see Greek Civil Code 1041 seq.) and the other original methods of acquisition of ownership, like *occupatio, accessio, specificatio,* etc., as also the provisions relating to the protection of ownership, to co-ownership, to easements or servitudes, are all provisions which in the Code reproduce the Greek Law in force, i.e., the Roman Byzantine Law in its last stage of evolution. On the contrary, the articles relating to transcription of conveyances or charges on immovables in official records (art. 1192 seq.), to pledges of movables (art. 1209 seq.) and hypothecs on immovables (art. 1257 seq.), basically reproduce the French Law system, adopted already in Greece during the first half of the last century, improved, however, and enlarged in the new Code by the comparison and the teaching of the more recent laws of other Continental countries.

VIII

Family law is contained in Book IV of the Code (art. 1346–1709), the first articles of which deal with betrothal.[18]

The law of marriage is most interesting, for the special reason that the Code retains the religious ceremony as an essential element in the conclusion and the validity of marriage. The participation of the Church in legal relations of a moral character, like marriage, divorce, etc., has a long history in Greek law. Marriage in particular was concluded in Byzantium with the "benediction" during the 8th century, while in 895 A.D. Leo the Wise provided that the religious ceremony should be compulsory and inevitable for the validity of a marriage (Novella 89 of Leo the Wise). From that time onwards the religious ceremony has remained until to-day uninterruptedly an essential element in the valid conclusion of a marriage. The close relation of Church and State in Byzantium, and, after the dissolution of the Byzantine Empire, the close relation of Church and Nation, has given to the religious ceremony in marriage the character of a deep-rooted institution in the mind of the Greeks, but it has not, however, a theocratic significance, nor is it a retrogressive conception to-day. Religious ceremony is a national legacy with an age-long history behind it, and that is the reason why the Code has retained it as an indispensable element in the conclusion of a valid marriage, and as an element not only in the sense of a simple formality of contract but as a substantive condition affecting the personal status of the spouses, which sometimes gives birth to difficulties in Private International Law.

Byzantine tradition is obvious not only in matters affecting the conclusion of marriage, but also as far as the impediments of marriage are concerned, and the distinctions of "non-existent marriage" (i.e., of a marriage concluded without religious ceremony), of void and voidable marriage (art. 1367, 1372 seq.), although due to the influence of the teaching of the western canonists, are perfectly adapted to the Byzantine system of religious ceremony and Christian orthodox thought.

Roman-Byzantine Law, improved by more recent statutes, formed the main provisions which in Greece governed the personal and the matrimonial relations of the spouses until the advent of the new Code. The new Code has been largely modelled on these provisions, with such amendments or improvements as the compilers saw fit to introduce.

In personal relations the husband is considered as being the head of the family (art. 1386). The administration of the house of the spouses is the right of the wife (art. 1389). The husband is bound to maintain his wife and the wife is bound to maintain her husband if he cannot maintain himself (art. 1391 seq.)

In matrimonial relations the outstanding principle is that the independent ownership of property by the spouses is not affected by marriage (art. 1397). The husband has to bear the *onus matrimonii* (art. 1398), to which the wife has to contribute only if the husband is unable to do so (art. 1399). The spouses, however, are free to regulate their affairs by contract (the so-called "matrimonial contract") which can be drawn up in any way agreed by the spouses, whether by community of goods or community of movables or of community of income and profits, etc., while the Code contains special provisions relating to the dowry system, since the *constitutio dotis* is an institution deeply rooted in Greek legal thought, widely recognized already in the laws of Gortyn and in the laws of the classical Greek period. The Roman conception of *dos*, as influenced by Greek thought and completed by Greek-Byzantine legislation and by more recent Greek statutes, has been the model in the formulation of the articles concerned. In the Code there are no longer persons (father, grand-

[18] Ch. Fragistas in *Zeitschrift für Ausländisches und Internationales Privatrecht*, vol. 9 (1935), pp. 384 et seq.

father or mother of the bride) who are bound to furnish a *dos,* as was the case in Roman Law. In the Code the wife remains the owner of the dotal immovables during marriage, whereas their administration and usufruct are entrusted to the husband (art 1412 seq.)—a rule contrary to the Roman principle that the *dos* as a whole was the property of the husband, and corresponding rather to the ancient Greek Law and to the Byzantine practice. Special provisions are included in the Code as far as alienation of dotal immovables is concerned, and it may be said that the whole institution of the *dos* shows an obvious improvement in comparison with the Roman-Byzantine theory and the Greek Law in force until recently.

Since 1920 the law of divorce has been regulated on the model of the Middle European systems. The provisions concerning illegitimate children have been formulated on the model of the Swiss Code, and represent a compromise between the two different systems on the Continent, namely, the French and the German systems, especially as far as the effects of the so-called " judicial " or compulsory recognition of illegitimate children is concerned. Adoption—an institution already recognized in ancient Greek law, in the law of the Hellenistic period, in Byzantine and post-Byzantine Law, as also in modern Greek Law—has been also improved and simplified in the Code. Finally, the provisions relating to guardianship and curatorship reproduce mainly French Law, already in force in this matter in Greece since 1861, greatly, however, improved and amended in the Code, where the powers of the courts in safeguarding the property of children have been enlarged and strengthened.

IX

The fifth and last Book of the Code contains the Law of Inheritance. Here again the Roman-Byzantine Law had already been extensively amended in Greece by more recent statutes before the advent of the Code. The Code basically retained this *status quo,* adding some modifications and improvements.

Will and intestacy are the two main grounds of succession in the law of inheritance. Greek law and the new Code, however, recognize also a compulsory right of inheritance which represents the end of an age-long evolution in Roman-Byzantine Law. A contractual right of inheritance is not recognized in the Code, where also the Roman maxim *nemo pro parte testatus pro parte intestatus decedere potes*t has been abandoned.

It is a curious phenomenon in the law of inheritance that some general ideas of ancient Greek Law have reappeared in the new Code, however in an indirect way through the influence of Middle European legal thought.

Thus, in the law of wills, the Roman distinction of " testament " and " codicil " has been abolished, and the idea of testament in the Code no longer requires a special appointment of an heir—a rule already recognized in ancient Greek Law, introduced, however, in the Greek Code through the influence of the German Civil Code.

The Code recognizes the holograph will, the publicly declared will (made before a public notary) and the so-called " secret " will, namely, a will deposited for safekeeping with a public notary (art. 1721, 1724, 1738). Relaxation of these formalities is recognized in some exceptional cases, as in the case of a will made on board ship, or of the will of a soldier on active service, or of a mariner at sea, or of a will drawn up in a place isolated from the outer world by reason of an epidemic or of other exceptional circumstances (art. 1749 seq.). Finally, revocation of will, appointment of heirs, contents and interpretation of wills are contained in provisions where Roman thought and the influence of Middle European Law are everywhere apparent.

Order of succession in case of intestacy is another topic where ancient Greek Law has been revived. The Code adopted the so-called " Parentel " system of classification of next-of-kin, as laid down in the German Civil Code (§§ 1924

et seq.), which, however, is a system widely recognized in the laws of the ancient Greek Commonwealth, as it has recently been brought to light by the discovery of the parchment of Dura-Europos and other early evidence. The new Code, however (art. 1813 seq.), limited the relatives entitled to the inheritance to the cousins—a solution different from that of the German Code.

The compulsory right of inheritance which falls to the issue, to the parents and to the spouse of the deceased, the computation of compulsory portions, deprivation of the right to a compulsory portion, etc., as also *exheredatio*, liquidation of inheritance, liability of an heir, *petitio hereditatis*, alienation of inheritance, legacies, etc., all have been hammered out in the Code on the anvil of Roman tradition and have been formulated in a much simpler way than in the German Code.

The useful institution of executors and administrators is not recognized in continental Law to the extent which prevails in this country. In continental Law, however, as also in the new Greek Code, an executor can be appointed in a will by the testator, in order to execute the directions of the deceased's will, often under the control of the competent tribunal (art. 2017 seq.)

Finally, it is worthy of note that the new Code adopted the useful institution of the so-called " certificate of inheritance " (i.e., the *Erbschein* of the German Code) issued by the competent court, which effectually protects the rights of an heir by creating a presumption in favour of these rights (art. 1956 seq.).

X

This brings me to the end of this rapid survey of the contents of the new Greek Civil Code of 1946.

I have tried to show how this Code, after age-long attempts, has at last been able to liberate itself from any exclusive influence derived from foreign systems of law, and how, basically reproducing the Roman-Byzantine tradition, which is a Greek law tradition, it has been drawn up by the comparative method.

Comparative law, or, better, the comparative method, has a long tradition in Greek legal science, from the days of Plato, Aristotle and Theophrast, whose comparative researches into the laws of the Greek commonwealth give us the earliest record of the comparative method in legal history, until more recent times, when in Greece, during the last century, foreign laws, either in the form of statutes or in the form of case-law, were studied so successfully.

Now, the new Greek Code is the product of this comparative research on the part of the Greek lawyers. This Code is not a revolutionary codification, it is rather a crystallized formulation of current legal thought and of Greek law already in force. Here perhaps lies a possible weakness, since Codes and codifications have as a mission to cover the requirements of legal life in anticipation if possible of the future. This Code, however, reproduces the *status quo* of the Greek legal thought of to-day, but I venture to say that this legal thought had reached a state of development and maturity which allowed such a codification.

The new Code does not contain provisions like the famous article 1 of the Swiss Code. After discussion the framers of the Code preferred to leave the whole problem of filling up the so-called gaps in law to the legal scientists and to the courts. If, however, the Code does not follow the modern tendency in this respect, it may be said that the adoption of general clauses, shown in such phrases as *boni mores*, " justice and equity," " public order," " abuse of rights," " good faith," " usage in transactions " (see art. 3, 178, 179, 200, 281, 388, etc.), is an achievement which remains in full accordance with the claims of the modern legal theory and practice on the Continent. These principles pre-suppose a generous and wise activity on the side of the courts. And I venture to say that Greek Justice as a whole has always given evidence of a careful and wise development in law, which may also be expected with confidence in the application of the new Code in the future.

CONSCIENTIOUS OBJECTORS IN GREAT BRITAIN AND THE DOMINIONS

[*Contributed by* ROBERT S. W. POLLARD, ESQ.]

THE two 20th century world wars have each seen the enforcement of compulsory military service in Great Britain and some of the Dominions. It was a new institution so far as they were concerned, although the Continent of Europe had known it for over a century. Conscientious objectors were unknown to law in Europe, but in the British Commonwealth a different conception of freedom prevailed. The struggle of the Quakers against compulsory military service under the Militia Acts in the 18th century was not forgotten and in 1916, therefore, exemption was provided for C.O.s. The tussle in Great Britain between the State and objectors in the first World War led to more liberal provisions in 1939. It is instructive to compare this procedure with that in the Dominions.

Great Britain.—Tribunals for conscientious objectors to military service were set up during the 1914–1918 war under the Military Service Acts, and functioned either badly or indifferently.

Tribunals for conscientious objectors (C.O.s) in connection with the last war were set up before the outbreak of that war by the Military Training Act, 1939, which, however, was first suspended by s. 12 of the National Service (Armed Forces) Act, 1939, and later allowed to expire. Tribunals are now operating under the National Service Acts, 1939-1946, and are established under s. 5 and Part 1 of the Schedule of the 1939 Act as amended by S.R. & O. 1942, No. 93, amending the Defence (Armed Forces) Regulations, 1939. There are nineteen local tribunals, each consisting of a chairman, who is a county court judge, and six other persons, appointed by the Minister of Labour, but only four members of the tribunal, besides the chairman, sit to hear cases. The Minister is required by the Act to have regard to the necessity of selecting impartial persons; at least one man and one woman must be appointed after consultation with organizations representative of workers—they are generally trade union officials or retired trade union officials—and at least two members of each tribunal, other than the chairman, must be women.

By the National Service (No. 2) Act, 141, single women were made liable to military conscription, and consequently were able to register as conscientious objectors. When a woman appears before a local tribunal the tribunal must so far as practicable include at least one woman, but the proceedings are not invalidated if this requirement is not complied with.

From a decision of a local tribunal an appeal lies either by the C.O. or the Minister to the Appellate Tribunal, of which there are six divisions. Each division consists of a chairman nominated (in England) by the Lord Chancellor and of four other persons appointed by the Minister, of whom one man and one woman are appointed after consultation with organizations representative of workers, and two of whom, other than the chairman, must be women. Three members of the tribunal sit to hear appeals, and in the case of women a male chairman sits with one or two women. Very occasionally one woman sits when appeals of men are being heard.

A person who registers for, or who is liable for military service, can at any time before medical examination, and within two days thereafter, make an application to be registered as a C.O. on the ground that he conscientiously objects:—

(*a*) to being registered in the military service register, or
(*b*) to performing military service, or
(*c*) to performing combatant duties.

He applies on a form and generally states what he objects to, why he objects,

and what are the facts and circumstances which can lead the tribunal to accept his genuineness. This form has to be returned to the Ministry of Labour within fourteen days of the registration, and then, unless the C.O. is deferred in due course, he receives a notice requiring him to attend before a local tribunal.

A local tribunal can make the following orders (s. 6, 1939 Act, as amended s. 6, 1941 Act):—

(1) Order a C.O. to be registered as a conscientious objector without conditions, or

(2) Order him to be registered as a conscientious objector on condition that he undertakes work specified by the tribunal of a civil character and under civilian control and if directed by the Minister of Labour undergoes training provided or approved by the Minister to fit him for such work. Examples of conditions are to stay in his present job, to do full time land work (under the control of a County War Agricultural Committee), full time civil defence work or full time social relief work, or

(3) Order him to be registered as a C.O., but liable for non-combatant duties only in the armed forces, or

(4) Order his name to be removed from the conscientious objectors' register; in this case he will be liable to be called up for military service like anyone else.

By the National Service (Armed Forces) (Miscellaneous) (Amendment) Regulations, 1940 (S.R. & O. 1940 No. 404) an objector is permitted to appear by solicitor or counsel or by his trade union representative or by any person who satisfies the tribunal that he is a relative or personal friend; the tribunal usually accepts without proof a statement of the person's status. The Minister may appear by solicitor or counsel. The applicant is not required to actually attend himself, but since it is his conscience which is under examination he generally finds it advisable to do so.

The procedure at the hearing is generally very informal and, although varying from tribunal to tribunal, in many cases it puts an applicant at his ease. Before the London local tribunal he is required to stand in the well of a council chamber while the five tribunal members sit above him, and sometimes two will question him at once. This experience can be more frightening than any court of law. Before the three London Appellate divisions, however, an appellant sits down at a table in front of the tribunal, and the proceedings have something of the character of an informal conversation.

Each member of the tribunal is provided with a copy of the C.O.'s statement. In the case of the Appellate Tribunal to which a C.O. can appeal within twenty-one days of the decision of the local tribunal, a copy of the chairman's notes of the previous proceedings and a copy of any letters furnished by the C.O. are included. It is found to be an advantage that tribunal members have generally read the papers through before the hearing. If the C.O. is unrepresented a tribunal will normally start either by enquiring if he wishes to add anything to his written statement or by asking questions about his statement and endeavouring generally to ascertain why he is a C.O. The length of the hearing may vary from five minutes to three-quarters of an hour, according to the complexity of the case and the tribunal's mood.

After the C.O. has been examined, he is asked if he has any witnesses. Evidence will also be provided by several letters from the C.O.'s friends and relations, which help the tribunal according to the amount of information they contain. A tribunal has power to require evidence to be given on oath, but only a few exercise this power. The presumption that people will speak the truth even when not on oath appears to work fairly well. The ordinary law of evidence does not automatically apply to proceedings before tribunals since, save when otherwise expressly provided, the procedure has to be such as the chairman may determine. Accordingly, in practice tribunals allow statements

of opinion to be given by witnesses and by letters and hearsay evidence may be admitted. I have very rarely heard a leading question by an advocate objected to by a tribunal member or the Ministry of Labour representative.

The method of announcing the order of the tribunal varies. Many tribunals consult among themselves immediately after each case and announce the decision forthwith. Division 1 of the London Appellate tribunal reserve all their decisions, and this is probably the most desirable practice, since it enables the members of the tribunal to talk more freely about each case and to consider at more leisure what the C.O. has said before them, and the impression made by him, his written statement, letters, witnesses and their evidence. Reserving the decision generally means that the case is considered more thoroughly. Some tribunals retire to consider their decision in every case, or every few cases, announcing the decision on their return.

The Act contains no definition of a conscientious objection, but tribunals have interpreted it very widely, having even registered as C.O.s those who will fight for Eire but not for England. It is, however, generally recognized that a conscientious objection within the Act is a decision of the whole personality that it would be morally wrong for him or her to take part in the war effort in some way specified. Tribunals are obviously entitled in such a situation to range over a wide field in the questions they can ask.

The Ministry of Labour are entitled to be represented at tribunal hearings but, in practice, rarely are. Moreover, the Ministry of Labour may appeal from the decision of the local tribunal, and they have been known to do this; but the Appellate Tribunal has not always accepted the view of the Ministry and has sometimes dismissed the appeal. Tribunals quite often show by their decision that they are, and desire to be, independent of the Ministry of Labour.

Tribunal hearings are normally held in public, and the Press and anyone interested can attend. While the Press attends some local tribunals, it is rarely that it attends Appellate Tribunals. Under subsection 12 of s. 5 of the 1939 Act, no determination of a local tribunal or the Appellate Tribunal made for the purpose of that Act can be called in question in any court of law. It has never been decided whether this effectively excludes all applications in the High Court, to control tribunals by prerogative orders, but Butterworth's *Military Service* says: "It is submitted, however, that nothing in this provision abrogates the ordinary rule of law that whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of this legal authority, or use that authority wrongly (as, e.g., by failing to act in strict accordance with the rule of procedure laid down for them) such persons are subject to the controlling jurisdiction of the King's Bench Division."

Eire.—There are no conscientious objectors in Eire because there is not compulsory military service there.

Union of South Africa.—There are no laws in the Union of South Africa relating to conscientious objectors.

Military service in South Africa is provided for by the South African Defence Act (No. 13 of 1912, as amended) whereby every citizen of European descent is liable between his seventeenth and his sixtieth year (both included) to render in time of war personal service in defence of the country in any part of South Africa within or without the Union. Further, every citizen of sound physique between his seventeenth and his twenty-fifth year (both included) is liable to undergo a course of peace time training for a period of four years. All employers are bound by law to afford their employees facilities for this training without in any way prejudicing their employment. A minimum of 50 per cent. of those liable for peace time training is required annually, others being required in their twenty-first year to enrol as members of rifle associations for a period of four consecutive years. As an alternative, citizens may enter for service in the

South African Division of the Royal Naval Volunteer Reserve. Every other citizen liable to render war service is also allowed to engage as a member of a rifle association if he elects to do so.

All military operations by South African Forces outside the limits of the Union have so far been performed on a voluntary basis.

Australia.—Provisions for conscientious objectors in Australia are made by the National Security (Conscientious Objectors) Regulations issued under the National Security Act, 1939-1940.* They are administered by the Minister of State for the Army. These regulations follow the British law rather more closely than other Dominions. By Regulation 6 (1942, No. 80):—

Any person liable under the Defence Act to serve in the Citizen Forces, and who has not, prior to the commencement of these regulations, taken the oath, or made the affirmation of enlistment, who claims that he holds a conscientious belief which does not allow him:—

(*a*) to perform naval, military or air force service (whether combatant or non-combatant); or

(*b*) to perform combatant naval, military or air force service

may make application to be registered or enrolled as a conscientious objector.

As in Great Britain application may be made at any time before he is medically examined or within two days after examination, but the Minister may extend the time. A copy of the application is then forwarded to the local clerk of a court of summary jurisdiction and the application, in due course, comes on for hearing by this court, composed of a police stipendiary or special magistrate, seven days' notice being given of the hearing.

By regulation 8 the court may, if satisfied that an applicant holds a genuine conscientious belief that it is wrong for him,

(*a*) to perform naval, military or air force service (whether combatant or non-combatant) or

(*b*) to perform combatant naval, military or air force service

by order direct:—

(i) in any case to which paragraph (*a*) applies that the applicant shall be registered in the register of conscientious objectors kept by the Minister conditionally—the condition being that he shall perform such work of a civil character and under civilian control as is specified by the Minister of State for Labour and National Service, and shall undergo any training provided or approved by that Minister to fit him for that work;

(ii) in any case to which paragraph (*b*) applies that the applicant shall be enrolled under the Defence Act as a person liable to be called up for service in the Citizen Forces but to be employed only in non-combatant duties.

If not so satisfied, the Court must by order direct that the applicant shall not be so registered or enrolled or, if already so registered or enrolled, that the registration or enrolment shall be cancelled. Conditions governing such training or performance of work may be specified by the Minister.

The original Regulation of 1942, No. 80, authorized unconditional registration of a conscientious objector as in Great Britain, but that was revoked by No. 307 of 1942.

A court, in determining any application, must have regard (in addition to all other relevant considerations) to the extent to which the evidence of the applicant is corroborated, and to the period during which the applicant claims to have held his conscientious belief and the circumstances in which he claims to have formed it and to have continued to hold it. The court may, if it thinks fit, accept the evidence of the applicant whether it is corroborated or not.[1]

* (i) See Statutory Rules 1942, No. 80; (ii) See Statutory Rules 1942, No. 307; (iii) See Statutory Rules 1943, No. 162.

[1] Regulation 2 inserting new regulation 8, 1942, No. 307.

The Minister may be represented at any hearing or appeal and an officer authorized by the Commissioner of a Lines of Communication Area may appear for the Minister at the hearing of an application. It is not clear whether an officer may appear for the Minister at an appeal.[2]

No provision is made about representation of an applicant and presumably he is therefore entitled to be represented.

An appeal may be brought by the Minister or an applicant for registration within 14 days from the date of the order to the appropriate court. The appropriate court means a District Court, County Court or Local Court of Full Jurisdiction in the State or Territory of the Commonwealth in which the applicant, or the person whose registration or enrolment is to be reviewed, is residing or, if there is no such Court, the Supreme Court of the State or Territory of the Commonwealth in which the applicant or that person is residing. The time for appealing may be extended by the Court for special circumstances. The appeal is by way of re-hearing and the Court's jurisdiction may be exercised by a magistrate or single judge sitting in chambers.[3]

The Minister may at any time review a registration by applying to a court of summary jurisdiction for its cancellation or variation because of facts or circumstances which have come to his notice or have arisen since the former decision.

The case is then re-heard by the Court as if it were an original application and an appeal lies against the Court's order in like manner.[4]

Where a person is convicted of failure to observe a condition of registration the Minister may remove his name from the register. A person registered as liable for calling up, but to be employed in non-combatant duties only, is not liable to perform any duties of a combatant nature.[5]

A C.O. may request a cancellation of his registration in the register.[6]

No order of any Court made under these regulations is to be called in question in any court of law.[7]

A C.O. undergoing training provided or approved by the Minister or performing work specified by that Minister, in pursuance of these regulations, is to be paid for that training or work at a rate of pay equal to

(*a*) the rate (if any) which would, apart from this regulation, be payable to him in respect of that training or work by or under any relevant industrial award, order, agreement or determination; or

(*b*) the aggregate rate of pay, subsistence allowance and dependant's allowance which would be payable in respect of that person if he were serving in Australia as an ordinary private soldier in the military forces,

whichever is the less.[8]

Where the remuneration of any person undergoing such training or performing such work is that specified in paragraph (*b*) above, the difference between the amount so payable and remuneration at the rate (if any) specified in paragraph (*a*) above is, except in any case where the person is being employed by the Commonwealth, to be paid by the employer as soon as practicable after each pay period into a fund specified by the Minister.

Canada.—By s. 2 of the National Resources Mobilization Act, 1940, the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, requiring persons to place themselves,

[2] Regulation 5 amending Regulation 11, 1943, No. 162.
[3] Regulation 3 substituting new Regulation 9, 1943, No. 162.
[4] Regulation 11, 1942, No. 80.
[5] Regulation 14 (2), 1942, No. 80.
[6] Regulation 15, 1942, No. 80.
[7] Regulation 16, 1942, No. 80.
[8] Regulation 5 substituting new regulation 17, 1942, No. 307. No provision about pay of C.O's is contained in the law of Great Britain although some local authorities enforced reduced rates on their C.O. employees. The legality of this action was doubtful but was not tested in the courts.

their services and their property at the disposal of His Majesty in the right of Canada, as may be deemed necessary or expedient for securing the public safety, the defence of Canada, the maintenance of public order, or the efficient prosecution of the war, or for maintaining supplies or services essential to the life of the community, and under s. 5, the Governor in Council may prescribe the penalties that may be imposed for violations of such orders and regulations, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

Conscientious objectors are recognized by the National Selective Service Mobilization Regulations, 1944. These regulations are applied to age groups of men in accordance with proclamations of the Governor. Men required for military training are provided by Registrars appointed by the Minister of Labour.[9]

Applications for postponement of military service are dealt with by the Mobilization Board which is appointed for each of the thirteen divisions into which Canada is divided.[10]

One member of each board must be a judge of a Superior or other Court of the Province, who is chairman. The Governor may appoint any number to the Board.

Two members constitute a quorum, one of whom must be the chairman or deputy chairman, and not more than three may sit together. The decision is by majority and the chairman has a casting vote. A decision is final and conclusive but the Board may reconsider or review a decision of its own motion at any time. No member of the Board is responsible at law for anything done by him in good faith. A board may order an applicant's appearance before it or one of its members, or before a judge of a Superior or other Court or magistrate.

A board, a member of a board, a judge, a magistrate or a registrar, if so authorized by a board, may, in connection with proceedings before the Board, take evidence on oath or affirmation and may administer oaths and may summon persons to attend before him or them for the purpose of giving evidence.

No proceedings authorized or pending before a board and no decision of a board may, by means of an injunction, prohibition, mandamus, certiorari, habeas corpus or other process, issuing out of court, be enjoined, restrained, stayed, removed or subjected to review or consideration on any ground whether arising out of alleged absence of jurisdiction in a board, nullity, defect or irregularity of the proceedings or any other cause whatsoever, nor may any such proceedings or decision be questioned, reviewed or reconsidered in any court.[11]

Applications for postponement are made within 14 days of the date of an "order—medical examination" or such extended time as the board permits.

At the hearing of all applications made to a board, the representative of the Department of National Defence, the representative of the National War Labour Board, the representative of Agriculture and the representative of the Director of National Selective Service are entitled to be present and to make such representations as they may deem fit.

Any person who appears before a board does so at his own expense.

Every hearing of a board, unless the board otherwise directs, is in camera, and no person is entitled to be represented by counsel, advocate or solicitor, but the Governor's representatives mentioned above are entitled to be present at hearings of the board and make such representations as they deem fit.

The decision of a board is final and conclusive and binding upon all concerned, but before making an order the board may make any investigation it may deem advisable and it may reconsider or review its decision, of its own motion, at any time. There is no appeal from a board's decision.[12]

[9] Regulation 6.
[10] Regulation 8.
[11] Regulation 9.
[12] Regulation 10.

The procedure for dealing with conscientious objectors has similarities with New Zealand, where also all applications for postponement are heard by the same body.

If, upon an application for a postponement order, the board is satisfied that the applicant conscientiously objects, by reason of religious training and belief, to war in any form and to participation in combatant military service in which he might be required to take human life, the board must grant him an order postponing his military training until further notice. The board may cancel a postponement order made on such grounds at any time if it is satisfied that the person to whom it was granted is no longer entitled to such postponement. It will be noted that exemption can only be given to objection based on religious belief.[13]

A Registrar may, but need not, postpone serving an "order—medical examination" on a person who has been granted postponement.[14]

Part IIA of the National Selective Service Civilian Regulations provides for alternative service of any work or project prescribed by the Minister of Labour for persons to whom postponement orders have been granted as conscientious objectors. It is administered by a selective service officer who, for the purposes of these regulations, is known as an alternative service officer.

By Regulation 251 the alternative service officer may from time to time serve a person to whom that part applies or cause him to be served, either personally or by registered mail, with an order to report at the time and place and to the person therein specified to carry out alternative service.

Every person upon whom an order is served under this section must comply with it and live in such place or places under such circumstances and perform such alternative service as may from time to time be determined by the alternative service officer.

The Minister must pay not less than 50 cents per day to every person performing alternative service and may pay not more than 75 cents per day to any person who has been appointed a sub-foreman and not more than one dollar per day to any such person who has been appointed a foreman.

Any person who is placed in charge of a place pursuant to an arrangement or agreement under this section may give to persons required to report to such place, and delegate to others authority to give to such persons, all orders reasonably necessary for discipline in such place or for the proper performance of the alternative service which they are required to carry out.

The Minister may prescribe rules for the regulation

(*a*) of any place to which persons are required to report and of the conduct of persons required to report to a place, and

(*b*) of the performance of alternative service.

A person disobeying any order of the Minister or any order or rule made in connection with the alternative service officer is guilty of an offence and liable upon summary conviction to imprisonment for a term not exceeding twelve months with or without hard labour, or to a fine of not less than 50 dollars and not exceeding 200 dollars, or to both such imprisonment and such fine.

Where a man is convicted of such offence, the justice or justices of the peace, magistrate, judge or court before whom he is so convicted *must*, if counsel or other person acting for the Crown so requests, whether or not sentence is suspended and, in addition to imposing the punishment provided for the offence if sentence is not suspended, direct that the man shall be taken either forthwith or upon the expiration of the term of imprisonment, if any, in police custody to a place specified by counsel or other person acting for the Crown and delivered to the person in charge thereof.[15]

By Regulation 252 the alternative service officer may from time to time serve

[13] Regulation 13.
[14] Regulation 7.
[15] Regulation 251.

a conscientious objector or cause him to be served either personally or by registered mail, with an order requiring him to apply forthwith for such employment in agriculture, industry or elsewhere as may be specified in the order or by a selective service officer named in the order and to accept the employment, if it is offered to him, upon such terms, not inconsistent with the terms of employment laid down in this regulation, as are specified in the order or by the selective service officer named in the order.

An employee under this regulation is to receive by way of remuneration board and lodging and 24 dollars a month, the excess over 25 dollars to go to the Canadian Red Cross Society, but expenditure of the excess may be authorized for dependants and medical expenses. The alternative service officer may permit a conscientious objector to continue his occupation on condition of paying to this Society an amount prescribed by the Minister.

Regulations 250–256 contain subsidiary provisions for seeing that alternative service is complied with.

New Zealand.—Conscientious objectors in New Zealand come under the National Service Emergency Regulations, 1940, as amended, made under the Emergency Regulations Act, 1939.

By Regulation 5 a general reserve is established of every person of 16 or over resident in New Zealand and by Regulation 6 the Governor-General may proclaim and direct the enrolment of any class of the reserve. The Minister of National Service may issue a warrant for calling up a specific number of men from a class[16] and a notice is then to be published in the *Gazette* of the men called up for service.[17] A person called up is deemed to be transferred from the reserve to the Army.[18]

A person called up for service may appeal to an Armed Forces Appeal Board (*inter alia*) on the ground that he conscientiously objects to serving with the armed forces.[19] By Regulation 22 a Minister establishes such number of appeal boards as he thinks necessary. They consist of three persons holding office during pleasure, one member being appointed chairman, and all must sit. A deputy chairman and deputy members may be appointed.[20] The procedure of an appeal board is such as the board thinks fit, and it may accept evidence which is not admissible in a court of law.[21]

Under Regulation 26 a notice of appeal to a board must be posted within 10 days after the notice in the *Gazette* calling the applicant up for service. It must state the grounds of appeal and may be accompanied by documentary evidence or a statement of facts. It may be amended before the final determination of appeal. The Minister may transfer an appeal or appeals of a specified class to another appeal board.[22]

Under Regulation 27 a board may allow an appeal without calling on the applicant or hearing his evidence, but otherwise he is to receive reasonable notice of the hearing. The appeal will be proceeded with whether or not he is present. He may be represented by a barrister or solicitor or any other person with leave. The Minister may be represented by any person appointed by him, may produce evidence, be heard in opposition and cross-examine witnesses. An appeal is to be heard in public unless in any particular case with due regard to the interests of the applicant and other persons concerned it is considered better to hold it in private. The board may deliberate in private. The hearing of an appeal may be adjourned to any time or place or *sine die*. A board may order the evidence of any person to be taken before another appeal board.[23] A

[16] Regulation 13.
[17] Regulation 16.
[18] Regulation 17.
[19] Regulation 21.
[20] Regulation 23.
[21] Regulation 24.
[22] Regulation 26A.
[23] Regulation 27A.

board may reserve its decision and give it without previous notice to any party.[24]

A determination is conclusive on the facts found, but the Director of National Service may bring a case before a board again on the ground that its decision was arrived at by fraud or that new and material evidence has been discovered and there is then a re-hearing. There is no appeal from the decision of an appeal board as is the case with conscientious objectors and applicants for postponement of service in Great Britain.

Regulation 28A deals with appeals by conscientious objectors.

(*a*) If the Appeal Board is satisfied that the appellant holds a genuine belief that it is wrong to engage in warfare in any circumstances, it must allow the appeal;

(*b*) If, in any case to which the last paragraph does not apply, the appeal board is satisfied that the appellant holds a genuine belief that it is wrong to perform combatant duties in the armed forces, it must dismiss the appeal subject to the condition that the appellant shall be employed only in non-combatant duties in the armed forces;

(*c*) In any other case the appeal board must dismiss the appeal unconditionally.

In determining any such appeal, an appeal board will (in addition to all other relevant considerations) have regard to the extent to which the evidence of the appellant is corroborated, and to the period during which the appellant has held his belief and to the circumstances in which he formed it and has continued to hold it. Whatever the period and circumstances may be, the board may accept the evidence adduced by the appellant, whether it is corroborated or not. An appeal on any other ground must be dealt with before an appeal on grounds of conscientious objection.

It is the duty of the military authorities to secure that a condition requiring non-combatant duties only in the armed forces is complied with. A conscientious objector may at any time transfer into the armed forces either unconditionally or for non-combatant duties.

Conscientious objectors are controlled by a special tribunal set up under Regulation 4A composed of such number of persons as the Governor thinks fit, holding office during his pleasure. It can act by one member, has compulsory powers to summon witnesses and require production of evidence. The procedure is such as the member thinks fit, but a person may be legally represented. The rules of evidence do not apply; there is no appeal from an order of the special tribunal and none of its proceedings may be challenged, reviewed, quashed, or called in question in any court, except on the ground of lack of jurisdiction.

Every person commits an offence who without lawful excuse acts in contravention of or fails to comply in any respect with any order, direction, or summons made, given, or issued by any member of the special tribunal under these regulations or under the Commissions of Inquiry Act, 1908.

No person may be present without permission at any proceedings before any member of the Special Tribunal. No person may print or publish any report or description of any proceedings before any member of the special tribunal, or any matter purporting to be a report or a description thereof, except such report or description thereof as may be authorized. If any matter is published in any newspaper or other periodical or in any other document in contravention of this prohibition, the proprietor, editor, printer and publisher of the newspaper or other periodical, or the printer and publisher of the document, as the case may be, are each to be deemed to have committed an offence against these regulations. The penalty for an offence against the regulations is imprisonment for not more than three months or a fine of not more than £50.[25]

[24] Regulation 28.
[25] Regulation 56.

This account of the Special Tribunal is necessary because under Regulation 28A (5) where any appeal of a conscientious objector has been allowed, or has been dismissed subject to the condition or with a recommendation that the appellant shall be employed only in non-combatant duties in the armed forces, any member of the Special Tribunal may from time to time make such orders against or give such directions to the appellant or any other person or class of persons as may appear to that member to be necessary for the purpose of ensuring that for the duration of the war:—

(*a*) the financial position of the appellant shall be no better than it would be if he were serving as a member of the armed forces.

(*b*) the appellant shall be employed on such work of a civil nature and under civil control as the public interest requires, whether by continuing in his existing employment or occupation or otherwise, and upon or subject to such terms and conditions as the public interest requires, not being inconsistent with the provisions of any Act, or of any regulations or orders made under any Act, or of any award or industrial agreement, or of any other agreement whatsoever that may be applicable to that employment. Any such order or directions may require the payment of any moneys into the Public Account to the credit of the Social Fund, at such times, and in such manner as may be specified in the orders or directions.

The jurisdiction of the Special Tribunal over conscientious objectors is paramount and a District Man Power Officer who is dealing with a conscientious objector's employment and thinks it should be changed, is supposed to report the case to the Special Tribunal with his recommendations for its order or direction. The Special Tribunal has an advantage from the Government's point of view because there is no right of appeal from its decisions and yet it appears to be a judicial body.

The 1943 Report of the National Service Department contains some interesting comments on the operation of this law.

"Though comparatively few in number, conscientious objectors have proved to be by far the most difficult section of the population to deal with in the matter of national service. It has not been at all easy to identify these genuine conscientious objectors from among those whose objection is concerned with the bearing of arms against a particular nation, or in a particular theatre of war, or with a particular manner of engaging in war, or from those who hold the view that the present war is not justified in the circumstances.

"As regards those conscientious objectors whose appeals were allowed or dismissed subject to non-combatant service (and who were not in the meantime required for mobilization), the anomaly arising from their favoured position relatively to other men necessitated the setting up of a Special Tribunal in the latter part of 1941. The functions of the Tribunal were twofold:—

(i) To ensure that these men were not thereby placed in a better financial position than if they were in the Army.

(ii) To ensure that they were employed in civilian work which was in conformity with the public interest.

"The Special Tribunal comprises four members, each working independently and with complete jurisdiction.

"By the end of December, 1942, payments made in terms of orders made by the Tribunal had amounted to £5,049 and there were at that time 373 orders in force, though this number was increasing as new cases were dealt with. There have been very few cases of failure to maintain payments in terms of obligations imposed by the Tribunal.

"The dismissal of an appeal, whether with or without provision for non-combatant duties, was in many cases not the end of the matter. About one-quarter of the men in these classes simply refused to perform service, and in

order to deal with these cases defaulters' detention camps were established in October, 1941.

"The men placed in these camps have been employed in:—

Farming pursuits; Flax-growing; Vegetable-growing; Forest thinning and pruning and Breaking in of land.

"In general the men are responding well to their obligations in the camps, and much useful service has been performed. Payment for this work has been governed by good conduct and industry marks, with a maximum of 1s. 3d. per day.

"Some of the men in these camps are zealous workers, while others are politically opposed to anything in the nature of co-operation with the camp authorities, and were it not for the vigilance of the camp authorities, these agitators would in many cases have exercised a bad influence on the rest. The religious type predominates, a high proportion being of the younger type of fit single man. Occupational types are well scattered.[26]

Defaulters' detention was established by Regulation 44A. A person called up for service who is convicted of contravening or failing to comply with an order or direction of a member of the Special Tribunal may in addition to other penalties be committed to defaulters' detention for the duration of the war. A person is detained in such place of detention and under such conditions as the Minister thinks fit. He may be arrested without warrant. A magistrate on the application of the Minister may order a defaulter to be detained in a prison if for any reason his presence in the camp is prejudicial to its good order and discipline. While in prison he may by order of the Minister be transferred from prison to a detention camp set up under Regulation 44B."

Conclusion.—In the opinion of the writer the Tribunal system in Great Britain provides the greatest liberty for conscience. Special tribunals for objectors only have functioned satisfactorily and in their standards of administration appear to be almost all administrative tribunals should be. Owing to their liberal interpretation of the law conflict with objectors has been reduced to a minimum. The Australian provisions appear fairly good, although the withdrawal in 1942 of the right to unconditional exemption must have meant prison for some objectors who would not conform. Canada forbids legal representation and neither there nor in New Zealand is there any right of appeal; both of which have been found most necessary in Great Britain. New Zealand has the extraordinary Special Tribunal and indefinite detention of defaulters.

Whatever detailed criticisms may be made and however inadequate some of the exemption may have been, it is surely most notable that the English-speaking countries—for the U.S.A. also made provision for C.O.s—in a total war when their existence was threatened as never before, exempted from the compulsion to use arms those persons who believed it to be contrary to their consciences. In doing this in such circumstances they showed most practically their belief in the freedom for which the war was fought.

CHANGE OF "CHRISTIAN" NAME

[*Contributed by* Dr. F. M. Goadby.]

The decision of Mr. Justice Vaisey in the recent case *In re Parrott's Trust*[1] has presumably but restricted application, but it raises certain points of interest and suggests that the law as to change of names, most particularly "Christian" names, is out of touch with modern conditions. A condition imposed by a Will required the legatee to adopt the "Christian" name and the surname of the testator. As to the surname there has never been any difficulty. "Surnames,"

[26] These detention camps are now closed (1946).

[1] 62 T.L.R., p. 189.

said Sir Joseph Jekyll in *Barlow* v. *Bateman*,[2] " are not of very great antiquity, for in ancient times the appellations of persons were by their Christian names and the places of their habitation." In that case property was left by a Mr. Barlow to his daughter on condition that she married one who should bear the name and arms of Barlow. The defendant, whom she married, had been called Bateman till within a few weeks of his marriage when he wisely decided to be called Barlow. Jekyll, M.R., held that the conditions had been complied with and refused to decree that the defendant must ever afterwards bear the name of " Barlow." His decree was, indeed, reversed by the House of Lords but the validity of a change of surname does not seem to have been impugned. Indeed, historically the surname is not a name but a nickname.

But the " Christian " name is a name indeed. And Mr. Justice Vaisey held that it could not be changed save by Act of Parliament, which can do anything and has done many strange things, or by the bishop on confirmation. The learned Judge was, it should be observed, concerned with a " Christian " name in the strict sense, i.e., one given on baptism. It may be assumed that the evidence or admissions before the Court showed that the legatee's names had been given on baptism.[3] Had this not been the case different considerations would have applied as I shall seek to make clear. Furthermore, by " baptism " in the sense in which the term is used in the ecclesiastical law applicable in England and in which Coke uses it in the passage referred to it in this case, must be meant a baptism administered under episcopal authority or at least subsequently recognized as valid by such authority.[4] In these circumstances the authority of Coke appears conclusive to the effect that such a baptismal name is not changeable save as indicated. The Will in question required that the change of name should be made by deed poll. This method of change of a baptismal name is certainly impossible in law and this fact seems to have been influential in determining the judge's decision. It might indeed be suggested that a private Act of Parliament could have been procured authorizing the legatee to change the whole of his name by deed poll. But this would be rather making a special law for the legatee than giving him a new name by Act of Parliament.

It is not, however, my purpose to question the soundness of the decision in the circumstances of the case. But let us suppose that the so-called " Christian " name had been " Christian " by social convention and common usage only, not as given on baptism, or, possibly, never claimed to be " Christian " in any sense. A large minority, if not a majority of His Majesty's subjects in England and Wales do not possess, and, in many cases, do not seek to possess a " baptismal " name in the strict episcopal sense. In Scotland this state of things is normal. But limiting ourselves for the present to England and Wales it must be observed that vast changes have taken place since the early 17th century when Coke approved the ecclesiastical rules as part of the Common law. At that epoch all infants born in England and Wales might, not unreasonably, be presumed to have suffered baptism under episcopal authority. But conditions to-day are very different. In the first place some Christian communities, e.g., the Society of Friends, do not practise baptism, others refuse to baptize infants, and several others abjure episcopal authority.

[2] 3 P. Wms. Case 16, p. 64.

[3] It is with " baptismal " names that the old cases are alone concerned. Thus, it was held in *R.* v. *Norman* (1 Ld. Raym. 562) that no one can have more than one Christian name; all names given on baptism form together a compound Christian name (*Walden* v. *Holman*, 2 Ld. Raym. 1015 per Powell J.). These rules are supported by the judgment in *In re Parrott's Trusts*.

[4] It has been suggested to me that as the episcopal churches regard " lay " baptism as " valid " in certain conditions a name given when these conditions are fulfilled is a true baptismal name. Presumably this would be the case if the baptized person sought formal reception. But the ecclesiastical law as to names is surely irrelevant as regards persons who abjure the authority on which it rests and its application might well be resented by them.

All these are not merely tolerated but recognized by the law. Then again, Jews neither have nor desire to have "Christian" names in any sense. And, further, increasing numbers of parents neglect or reject religious observances altogether.

Had the legatee in *In re Parrott's Trusts* been one of these considerable classes of folk, could he not have changed all his names by deed poll? Or have called himself what he pleased and announced his pleasure by any method which he found convenient? Mr. Justice Vaisey remarked in the course of his judgment that he could not think that the Court would wish to assist so inartistic an attempt to interfere with a man's name, the one thing which inalienably belongs to him and is the label which indicates his identity. This latter description more aptly applies to the surname than to the Christian name which in modern conditions is used almost exclusively in the family and among intimates. A change of Christian name would pass unnoticed when a change of surname would be a new and very obvious fact.

The Registration Act, 1874, 37 & 38 Vict. c. 88, does not require (s. 8) that a child should be registered by any name. The parents or guardians may, and sometimes do, register by sex alone. Sometimes the name has not yet been chosen, at other times, and cases of this kind have occurred within my experience, the parents object to giving a name save on baptism. The Act of 1874 makes provision for alteration of the registered name or for registration of a name given after the original registration. But such alteration or addition must be effected within 12 months after the original registration. Thenceforward the registered name, or absence of name, appears to be final, at least so far as the register is concerned. In a case within my knowledge all the children of a family were registered by sex only. All were subsequently baptized but the baptismal names were never registered. They have gone through life in this state and in later years much confusion has arisen. One son, born a year after another, died in infancy and the deceased child came to be confused with the living one. There were other troubles also.

Distasteful to some as the change of a baptismal name may be, yet no reason, save social convenience, can be adduced against a change of a mere "registered" name. The objection to the change of a "baptismal" name is ecclesiastical only. Surely there can be nothing so sacred about a civil registration as to prohibit a change? A name given at the font "in the presence of God" may in the eyes of many people have a certain sanctity. Moreover, the officiating clergyman can and does exercise some control. But a name given on registration must surely be changeable by the matured will of the then infant and absent recipient. If ignorance or stupidity has dubbed him "Adolf" he must be able to choose "Winston" in his riper age.

There is, indeed, a current of authority to show that even a person possessing a "baptismal" name may, if he so chooses, lawfully be known by any other name he pleases, and that such conventional "Christian" name may be used in legal documents though not given either on baptism or confirmation.[5] The doctrine that a baptismal name cannot be changed appears, indeed, to exist solely for the discomfiture of testators who wish to dictate names to their beneficiaries.

I submit that it is not to the credit of the English Courts and English legal doctrine that a system of names so rigid as to Christian names, so loose as to surnames, should have been developed largely on the basis of the remarks of a lawyer, however eminent in his day, who lived under social conditions so different from our own and died more than three hundred years ago. The law

[5] See cases in *English and Empire Dig.*, Vol. XXXV., p. 703. Even Income Tax authorities demand that the taxpayer should state his "Christian" name. In many cases the correct answer in law would appear to be that the taxpayer had none. See also *Williams* v. *Bryant* (1839) 5 M. & W. 447, in which Baron Parke said: "a person may at any time sue or be sued not merely by his true name of baptism but by any first name which he has acquired by usage or reputation."

is all too restrictive in pinning a person down to one baptismal name for life, and all too careless in leaving uncontrolled the change of the more important surname. " The mere assumption of a name which is the patronymic of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to the family is a grievance for which our law affords no redress."[6] A Levantine " Parakopoulis " may blossom forth as a " Spencer Churchill " at will, but only an Act of Parliament could change " Jim Harrington Spencer " into " Walter Jim Spencer." This distinction is surely ridiculous.

As to Christian names, at least, Scots law is more defensible. Even as regards surnames, Scotch practice appears in one respect, to be more reasonable and better in accord with tradition. A married woman is not treated in Scotland as having by marriage lost her maiden patronymic. This she retains, though entitled to use her husband's also, which for social purposes she generally does. This also appears to have been the practice in Dutch South Africa.[7] The custom was probably brought from Holland. In other respects there appears to be no difference between Scotch and English practice as to surnames. " A man may change his surname at will and without judicial authority."

As regards Christian names Scots law differs radically from that of England. Probably in pre-Reformation times the ecclesiastical rules still maintained here were applied over the Border. But bishops failed to maintain their authority in Scotland and were indeed at one time treated almost as animals *ferae naturae*. Baptism of infants continued under the new Presbyterian system; but whatever may be the precise view as to the efficacy of baptism as to which I offer no statement, it does not seem to involve any special significance being attached to a name given on baptism. The " Christian " name ceased, therefore, to have more than social or conventional authority though no express decision to this effect can be cited. It is, however, stated on high authority that a " baptismal " or " forename " may be changed as easily as a surname.[8] It is, indeed, usual to make a declaration and to register it in the " Books of Council and Session." Such registration[9] is for preservation and security only. The entry in the Register of Births may be amended by request to the Registrar within six months of first registration and thereafter upon application to the Sheriff. Such applications are by no means infrequent. A curious and exceptional case is reported in which application was made to the Court of Session.[10] The petitioner, presumably a Scotchman, had adopted an added Christian name " Lindsay " and was generally known as Henry Lindsay Johnston. On his application for episcopal ordination the Bishop refused to use the added name unless it was shown to have been authorized in some way. The would-be ordinand then addressed the Court of Session, seeking authority.

[6] Per Sir R. Phillimore in *Du Boulay* v. *Du Boulay*, quoted by Lord Lindley in *Cowley* v. *Cowley* [1901] A.C. 45, itself a remarkable instance of the extreme English indifference in the use of names.

[7] See an article on *Married Women's Surnames* in South African L.J. LXIII, pp. 53ff. The South African practice favoured the retention of the maiden patronymic as the correct legal name.

In Geneva in the 18th century the family name, it is stated, was a " matronymic " not a patronymic. Husbands used their wives' family name and bachelors their mothers. Thus Mallet du Pan was the son of Etienne Mallet, his mother's maiden name having been " du Pan." He left Geneva before marriage and, consequently, retained this name, otherwise he would have been known as Mallet Vallier after his marriage with Mdlle Vallier.

[8] *Robertson* (1899) 2 F. 127; *Furlong* (1880) 7 R. 910. These and certain other Scotch references have been kindly supplied to me by Mr. S. G. Kermack, Sheriff Substitute, Glasgow.

[9] See fully *Encyclopedia of Laws of Scotland* (1920), Vol. X, p. 138ff. (Article by the present Lord Lyon, King of Arms.)

[10] *Johnston* (1899) 2 F. 75.

This was granted, though the Court pointed out that judicial authority was not requisite and would only be accorded in special circumstances.

At any rate it is clear that change of Christian name is easy in Scotland. The rigid ecclesiastical lawyer may retort that it yet remains true that a baptismal name cannot be changed save by the Bishop on confirmation; the fact that Civil law ignores an ecclesiastical distinction does not nullify the distinction. But we may leave the ecclesiastical lawyer to cherish his thesis in peace. Had *In re Parrott's Trust* arisen as a Scotch case the decision would presumably have been different.

Indeed, the ancient distinction between "Christian" and "Surname" seems generally to have broken down. In modern French law no distinction is drawn between the two species of names. It is laid down[11] that "*le changement volontaire est illégal*" and a law of the Revolutionary epoch prescribes the somewhat elaborate steps by which a change may be legally effected. As is well known the choice of *prénom* is in France restricted to those of angels, saints and notables of ancient history; moreover, a measure of protection is given to a name either as a form of property or as a projection of the personality. But in spite of this more rigid law we are yet assured that names in France are frequently changed irregularly without untoward result and without exaction of legal penalty. No doubt this does not apply to baptismal names in Catholic circles. Nor can I say whether it applies only to surnames. The causes which make change of surname convenient do not operate so urgently to provoke a change of Christian name.

In modern times change of surname at least is very frequent in countries to which immigration is directed. After the British occupation of Palestine a large number of Jewish immigrants changed their name, adopting a Hebrew form. In England, and still more frequently in the Dominions, refugees and immigrants find it convenient either to alter their foreign names into an English form, or, less legitimately, to adopt as their own an English surname.[12] In Canada in particular, the need for regulation in this matter has led to recent legislation. The Ontario Acts of 1939 and 1940, are the most elaborate.[13] The Act of 1939, makes provision for change both of "given" name (i.e., Christian name) and surname. British subjects only may apply for a change, but application for change of surname of a married woman can only be made by the husband. Applications are made to the Judge of the County or District Court of residence and are to be accompanied by affidavit as to specified relevant facts (s. 4 (1), (2)). Persons who object to the proposed change may appear at the hearing (s. 7 (2)) and the judge may refuse the application on various grounds, e.g., that the change is sought for an improper purpose or is, on any other ground, objectionable (s. 7 (3)). These grounds for refusal including as they do a possible "embarrassment to any other person" with the same or similar name or "any other reason" are so wide as to give the Court almost unlimited discretion. In fact, I am informed, objections raised by persons of the same name on racial or personal grounds are not favourably entertained.

Orders effecting a change of name may be annulled by the Court if satisfied that the change was obtained by fraud or misrepresentation or for an improper purpose (s. 12). The Act declares that no person shall change or attempt to change his name except under the provisions of this Act (s. 13), but no penalty is imposed by the Act itself for irregular change of name. Similar legislation has been enacted in Nova Scotia[14] and provision for change of name has also been recently made in Manitoba (1938); British Columbia (1940);

[11] Planiol *Dr. Civ.*, 1 § § 387; Amos and Walton, *Introd. to French Law*, pp. 33-4.

[12] Certain restrictions as to exchange of surnames by aliens are laid down by s. 7 of the Aliens Restriction (Amendment) Act, 1919, (9 & 10 Geo. 5, c. 92).

[13] *Jour. Comp. Leg.* 3rd Series, XXIII, parts II and III, pp. 60, 61. I am indebted for further particulars to the courtesy of Mr. K. G. Morden, our Ontario correspondent.

[14] *Jour. Comp. Leg.*, 3rd Series, XXVII, parts I and II, pp. 39, 40.

Prince Edward Island (1941); Saskatchewan (1933, 1941).[15] The Canadian legislation ignores the sanctity of the " Christian " name. It is to be remarked that no such legislation is reported from Quebec in which province older ideas may still be prevalent. Might it not be well to subject legal change of name to conditions not onerous but such as to secure publicity and opportunity for consideration of reasonable objections? The law might surely require the use of the regular name in all documents purporting to have legal operation, and this under penalty, not, of course, to involve the nullity of the document. The proper, regular, name would be the registered Christian name and the patronymic or such other name or names as had been adopted in accordance with stated requirements as to publicity, etc., and alteration of the Register of Births.

But it must be admitted that it is easier to restrict the use of changed Christian names than that of surnames. Social life presents few occasions when we desire to be known by a changed " first " name but the use of a different surname sometimes for a respectable and, perhaps even more frequently, for not very respectable reasons is too common and convenient to be restrained by any save loose bonds.

A NOTE ON CROWN LANDS IN THE COLONIES

[*Contributed by* Dr. C. K. Meek.]

In England in Anglo-Saxon times the property of the king included his private estate, the royal residences, and certain rights in the folkland of the kingdom. There are two views regarding folkland, and both are of interest for the study of Colonial tenures. According to the view held at one time folkland was land belonging to the State or to the community, which the king or witan might grant to a person for his lifetime, but which did not descend to his heirs. Bookland, on the other hand, was held under a grant expressed in " a book," i.e., a charter or deed. But according to the later and better view folkland was land held by individuals who formed part of a village community and whose rights were defined by custom, while the incidents of tenure of bookland depended on the phraseology of the book and the bookland could be alienated.[1] A similar distinction is tending to manifest itself in African territories at the present time.

In due course the king ceased to have any purely private rights over land, but had complete freedom of disposal of the Crown lands, which were constantly being increased by confiscation, escheat or forfeiture. Under feudal rule when an estate came to an end through failure of heirs the land escheated or reverted to the lord by whose ancestors or predecessors the estate had originally been created, just as at the present time if a land-owning group in Fiji dies out the land is claimed by the Crown. In feudal times also the right of forfeiture was a royal prerogative in the case of all persons convicted of treason, and we shall see later that this prerogative is still reserved to the Crown in many of the Colonies, even in areas where the term " Crown lands " has been deliberately abandoned.

The freedom with which Crown lands in Britain were alienated by the monarch, particularly in the time of William the Third, led to the intervention of Parliament, which passed an Act in the reign of Queen Anne limiting the right of alienating Crown lands to a period of 31 years. The revenues of Crown lands were also made part of the public purse in 1760, when it became the practice for each sovereign to surrender them in return for the fixed annual payment of the Civil List. The control of Crown lands in Britain is now regulated by the Crown Lands Acts of 1829 to 1936, under which the management of the lands is entrusted to the Commissioners of Woods, Forests, and Land Revenues.

[15] *ibid* XXIII, parts II and III, p. 52; XXV, parts I and II, pp. 61, 78, 90.

[1] Holdsworth, *History of English Law*, Vol. II, 68.

With these preliminary remarks we may now pass on to consider the meaning of the term Crown lands in the Colonies. In some Colonies, like Barbados, the Crown owns practically no land at all, while in others, like British Honduras, most of the land is Crown land. But in many territories where the Crown claims rights over land it is not at all clear what those rights are, and the term Crown lands is used in a great variety of senses. Let us take the Northern Provinces of Nigeria, for example. When the British Government took over the administration of Northern Nigeria from the Royal Niger Company in 1900 it acquired the sole and absolute title to certain lands which the company had acquired privately as a commercial concern. These lands became the private property of the Government and so were classed as " Crown lands," though they included a number of native villages. Apart from these lands the Government claimed, by right of conquest, the ultimate title to all the other lands of Northern Nigeria. These lands were, under the Proclamation of 1902, described as " Public Lands " in contrast to the " Crown Lands." It is not clear why this distinction was made, and the Northern Nigeria Land Committee of 1908 declared that as all the lands of Northern Nigeria were at the disposal of the Government the distinction between Crown lands and Public lands was superfluous. The Committee asserted, moreover, the Government's right to impose a system of land taxation. These recommendations were embodied in the Native Rights Proclamation of 1910. But Lord Lugard, on returning to Nigeria in 1912, rejected the land taxation policy as contrary to native law and custom, which the legislation had set out to protect. It would also, he said, give the appearance that the Government claimed the ownership of the land. In the " Dual Mandate " Lugard definitely repudiated the view that the Government was the owner of all lands in Northern Nigeria. Apart from the Crown lands (that is to say lands acquired on payment from the Royal Niger Company, or for public purposes or for leasing to non-natives) the Government was the *trustee* only—not the *owner*. The Northern Nigerian land legislation had pronounced all lands to be " native " lands and laid it down that no title should be valid without the Governor's consent. But how can lands be described as native lands if the occupiers have no valid title without the Governor's consent and if the Governor is empowered, as he was under the Proclamation, to impose a rental as he likes? How does the declaration that no title to occupation shall be valid without the Governor's consent square with the accepted principle that in countries acquired by conquest or cession the private property, whether of individuals or communities, must be respected?[2] These questions are asked by Lugard in the " Dual Mandate," though he asserts that the Government retains its title to the ownership of unoccupied lands—a claim which would appear to be inconsistent with the rights of native communities and also with the definition of Crown lands given in the Nigerian Crown Lands Ordinance, which expressly excludes from the category of Crown lands all lands subject to the Land and Native Rights Ordinance.[3]

The exact legal position of the Crown, therefore, in the Northern Provinces of Nigeria (the former Protectorate of Northern Nigeria) is not very clear, and

[2] See e.g., the Privy Council's judgment in *Amodu Tijani* v. *The Secretary, Southern Nigeria*, [1921] 2 A.C. 399. The Privy Council, however, in a Southern Rhodesia case [1919] A.C. 211, held that the rights possessed by the natives in *unallotted* lands at the time of the British conquest did not fall into the category of private rights which the sovereign power would be required to recognize. The unalienated land, therefore, which was the subject of dispute and included the native reserves, was held to be the property of the Crown.

[3] In the Nigerian Crown Lands Ordinance " Crown land means all public lands in Nigeria which are for the time being subject to the control of His Majesty by virtue of any treaty, cession, convention or agreement, or by virtue of His Majesty's protectorate, and all lands which have been or may hereafter be acquired by or on behalf of His Majesty for any public purpose or otherwise howsoever, but does not include lands subject to the Land and Native Rights Ordinance "(i.e., the native lands of the Northern Provinces of Nigeria).

it is hardly satisfactory to say that the legal position does not matter so long as the law works satisfactorily, as it admittedly does, for with the changes in economic conditions there will be changes in the native customary law under which land is held, and the Government may have to face native claims to ownership of a kind not contemplated by the earlier legislators.

In Tanganyika and the Northern Territories of the Gold Coast the legal position is more or less the same as in the Northern Provinces of Nigeria, since the land legislation of these territories was based on that of Northern Nigeria. But in Tanganyika the term used is "public lands," not "native lands." In the Northern Territories of the Gold Coast all lands were at first declared to be "public lands," but in 1931 the term "native lands" was substituted for "public lands," and a declaration was added that the native lands were at the disposal of the Governor "for the use and common benefit of the natives."

In the Gold Coast Colony the people have always opposed any claim to land ownership on the part of the Crown, since the Colony was never conquered. In 1897 the Government brought forward a Bill which aimed at the permanent settlement of farmers on a system of tenure which would give them security of title against a chief or anyone else, but this measure was opposed on the ground that it sought to vest in the Crown rights over land which belonged to communities and individuals. The Bill was accordingly dropped and the Crown makes no claim at all to land ownership in the Gold Coast Colony, apart from the little it has acquired for public purposes. In 1912 Sir Henry Belfield (Cmd. 6278, para. 23) stated that the Crown possessed in the Gold Coast an inherent right of *ultimus haeres* to any land for which no other owner could be found, but if the Crown ever possessed such a right of escheat it has long since ceased to exercise it. In Ashanti the Crown could have established a legal claim to land ownership by virtue of conquest, but as no claim was put forward it cannot now be asserted. In the Colony of Nigeria, on the other hand, when Lagos was ceded to Queen Victoria by King Docemo in 1861, it seems to have been assumed that the "sovereignty" which King Docemo exercised over land in Lagos was of the same kind as that exercised by the Crown in England and that when he had made a grant of land he continued to retain the ultimate title. One result of this was that Crown grants issued by the Government (4,000 were issued between 1868 and 1912) led to a flood of litigation, since they were used by many individuals as a fee simple title which in fact belonged to families or groups. These grants created the impression that the Government claimed absolute ownership of all land ceded by the treaty.

In Kenya Colony the term Crown lands was formerly applied to the "Native Reserves" which are now known as "Native lands." But many of the native occupiers objected to the expression "Crown lands" on the ground that the land belonged to them and not to the Crown. The claim of native ownership was, however, rebutted by the Barth judgment of 1921 which held that the native occupiers were merely tenants at will of the Crown, an expression which Lord Hailey has characterized as an "unfortunate instance of the application of terms of English law to a situation which has no real parallel in that law." The Kenya Land Commissioners of 1932, while pointing out that the legal ownership by the Crown had been created with a view to safeguarding native rights, recommended that the term Crown land should no longer be applied to the Native Reserves. The native dislike to the land being called Crown land was, they said, natural, since natives could not understand that the Crown Lands Ordinance was largely a conveyancing measure. The Native Reserves should, therefore, no longer be called Crown lands, but Native lands, the *nuda proprietas* being deemed to lie with the native population generally, but vested in a trust and subject to the sovereignty of the Crown and its general powers of control. Such a position might cause concern to persons who set store by precision of definition, but the Commissioners saw no advantage in

attempting to define in terms of English jurisprudence conditions of native tenure to which they were inapplicable. The practical point was that it should be possible to build up a system of native land-holding from a basis of native custom, and there was no need to be concerned with abstruse questions of ultimate ownership. (Cmd. 4556, paras. 1635-1648)

As a result of these recommendations a new Ordinance, the Native Lands Trust Ordinance (No. 28 of 1938), made provision for the old reserves under the title of Native Lands, which were now excluded from the operation of the Crown Lands Ordinance. But the new Ordinance contained a clause which stated specifically that nothing in the Ordinance (save as expressly provided) should affect prejudicially any right, power, privilege or exemption of the Crown. Another section provided that in cases of treason or rebellion the land of any tribe, group or individual might be forfeited and revert to His Majesty. Furthermore, it was laid down by Order in Council that nothing in the new legislation was to affect the existing laws whereby the property in minerals and in water was vested in the Crown. Thus the ultimate sovereignty, if not the ultimate ownership, of the Crown over the new category of Native Lands was reaffirmed.

But the new Kenya terminology has not been consistently applied, for the recent legislation has not affected the position of the Northern Frontier Province and of Turkana—an area of over 100,000 square miles. These lands are just as much native lands as any others in Kenya, but they are not so designated. They remain subject to the Crown Lands Ordinance and not to the Native Lands Trust Ordinance. The reason for this is that these lands are very sparsely populated by nomadic pastoralists and it was felt that the elaborate safeguards provided under the Native Lands Trust Ordinance of 1938 would be inappropriate and unworkable in the Northern Frontier Province and in Turkana, and might place unnecessary obstacles in the way of mineral or other development.

In Nyasaland, land is divided into Crown Lands, Reserved Lands and Native Trust Lands. Crown lands include all lands acquired on behalf of His Majesty and all Government sites. Reserved lands include lands within the boundaries of a township, forest reserves and all alienated lands. Native Trust lands, which constitute 95 per cent. of the land of the Protectorate, are declared by statute to be vested in the Secretary of State for the Colonies. In Northern Rhodesia there is the same distinction between Crown Lands and Native Trust Lands. But in Uganda (apart from the " Mailo " lands of the province of Buganda, which are held as " absolute " estates) native lands are not classed as such, but as Crown lands. By the Crown Lands Declaration Ordinance of Uganda " all lands are presumed to be the property of the Crown, unless they have been, or are hereafter recognized by the Governor by document to be, the property of a person, or until the contrary thereof be proved as hereinafter provided." Section three of the Ordinance provides that " any person claiming any right, title or interest as against the Crown in any particular area of land shall lodge a claim with the Land Office within 12 months from the coming into force of this Ordinance, after the expiration of which no claims will be entertained."

In the Colony of Sierra Leone all land to which a title cannot be proved is claimed as Crown land, but in the Protectorate of Sierra Leone all land is vested in the tribal authorities. In Zanzibar, State land is known as public land and means any land in the Protectorate which is vested in or subject to any rights of disposal by the Sultan or by the Government of Zanzibar. It includes all waste or unoccupied land. But it includes also all lands occupied by natives of Zanzibar, that is to say by members of the indigenous African tribes. The Zanzibar provisions are anomalous in two respects, (*a*) State land is vested in two distinct authorities, and (*b*) a distinction is made between the rights of one class of the population and another.

In Fiji, Crown lands are defined as " all public lands in the Colony,

including foreshores and the soil under Colonial waters, which are for the time being subject to the control of His Majesty by virtue of any treaty, cession or agreement, and all lands which have been or may be hereafter acquired by or on behalf of His Majesty for any public purpose (including native land acquired under s. 4 of the Crown Acquisition of Lands Ordinance, 1940) or otherwise howsoever." Native land, on the other hand, is land which is neither Crown land, nor the subject of a Crown grant or native grant (i.e., a grant of land by native owners).

From this review it is clear that the term " Crown land " is used in a great variety of ways. It is applied to land over which the Crown has absolute rights, and to land over which it only has qualified rights, and to land in which it does not appear to have any well defined rights at all. On the other hand, the term " Native Lands " is applied to lands over which the Crown also has rights, though these rights vary in the different territories. Lands which are held in precisely the same way may be described as Native Lands in one territory and Crown Lands in another. In some territories " Native lands " are called " Public lands " though this term is nowhere precisely defined. The general picture is very confused, and the reason, of course, is that each colonial government has to a large extent been allowed to evolve along lines of its own, adapting its land policy to local circumstances rather than following any definite logical pattern. The attempt to follow English ideas of ownership has added to the confusion. But, as the changes in nomenclature indicate, the general trend of Colonial land legislation has been progressively towards a fuller recognition of native rights, as against those which had in the earlier days appeared to be inherent in the State. Even where the State has sometimes seemed to have made an unwarranted claim to legal ownership this claim has been made with the express purpose of protecting the actual ownership of the native communities.

Whether it would be possible to devise some more logical form of terminology is now perhaps a matter of little practical importance. It might be possible to confine the term " Crown " or " State lands " to those lands over which the State has unqualified control (whether by succession to the absolute rights of former rulers, or by purchase, or by the process of legislation). The second category would be " Other lands " or non-State lands, though the State might possess statutory powers giving it the position of a trustee, or conferring the right of control over alienation to non-natives, or of acquiring land for public purposes, and so on. It is hardly necessary to observe that the authority of a Colonial legislature to make laws controlling the use and alienation of land is not dependent on the question whether or not the land is the property of the Crown. Such laws do not imply or presuppose any claim of Crown ownership. They are laws of regulation, not of appropriation, which are found in the statute books of all civilized countries.

APPLICABILITY OF THE DOCTRINE OF EXTRA-TERRITORIALITY TO LEGISLATION BY THE INDIAN LEGISLATURE

[*Contributed by* S. D. Sharma, Esq.]

The Statute of Westminster, 1931, settled the controversy about the powers of Dominion Parliaments to make laws having extra-territorial operation, by expressly declaring and enacting " that the Parliament of a Dominion has full power to make laws having extra-territorial operation." However, the doctrine of Extra-territoriality still continues to be of importance in connection with legislation by the Indian Legislature and the Colonial Legislatures. In two recent cases the Federal Court of India expressed the opinion that extra-territorial

operation could not be a ground for holding legislation by the Indian Legislature *ultra vires* the Legislature. It is proposed to examine this view of the Federal Court of India.

In *Governor General in Council* v. *Raleigh Investment Co., Ltd.* [1944] F.C.R. 229, Spens C.J. delivering the judgment of the court expressed the opinion that if the law was " truly one with respect to an enumerated subject-matter," its extra-territorial operation could not be a ground for holding it *ultra vires* the Indian Legislature. In the case, however, as the Federal Court held that the impugned Indian Legislation had no extra-territorial operation, the observations of the Federal Court, although elaborated to a great length, are merely *obiter*.

In *Wallace Bros. & Co., Ltd.*, v. *Commissioner of Income Tax, Bombay* [1945] F.C.R. 65 at p. 77, the Federal Court again remarked that " the second contention urged on behalf of the respondent that, even if these provisions are in any measure extra-territorial in their effect, that is not a ground for holding them to be *ultra vires* the Indian Legislature is supported by the decision of this Court in the *Raleigh Investment Co. Case* (*supra*). We have nothing to add to the reasons there set out in support of that conclusion." But this observation by Spens C.J. is again mere *obiter* as the Federal Court had already held on the first ground that " the impugned provisions of the Indian Income-tax Act cannot be held to be extra-territorial in their operation " (*supra*).

It will be best to examine the reasoning of the Federal Court in support of the view expressed in the *Raleigh Investment Co. Case* (*supra*). The Federal Court agreed that " There can be little doubt that the earlier view was that subordinate legislatures shall not be held ' to possess any extra-territorial jurisdiction unless it is conferred upon them expressly or by necessary implication '." (See the observations in *Macleod* v. *Attorney-General for New South Wales* [1891] A.C. 455 and *Commercial Cable Co.* v. *Attorney-General for Newfoundland* [1912] A.C. 820.) But the Federal Court holds that the modern view is that there is no such presumption.

In support of their view the learned judges refer to *Croft* v. *Dunphy* [1933] A.C. 156 where the application of the doctrine to Canada was considered independently of the Statute of Westminster, 1931. It is submitted, however, that *Croft* v. *Dunphy* was not decided on the ground of competence of the Canadian Legislature to pass laws with extra-territorial operation before the Statute of Westminster, 1931. The whole trend of the opinion of the Judicial Committee points the other way. The case was clearly decided on two grounds:—

(1) The competence in international law of a State to pass certain kinds of laws operating beyond the conventional three-miles seaward belt. " But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory." [1933] A.C. 156 at 162. The Judicial Committee took great care to support this view. They quoted Lord Stowell, Sir Travers Twiss, Halleck and Hall and referred to Phillimore and Wheaton. Thus they established that the impugned provision in the Canadian legislation was within the competence of the Canadian legislature. As the ship seized in pursuance of the Canadian statute was Canadian, no question of any breach of international law arose.

(2) The practice in England in 1867 of passing customs legislation extending beyond the territorial waters and the consequent presumption in favour of this power having been conferred upon Canada in 1867 by necessary implication. " It will thus be seen that, when the Imperial Parliament in 1867 conferred upon the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits . . . In these

circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy " (*ubi sup.* at p. 166).

Thus it is clear that in *Croft v. Dunphy* the Judicial Committee decided only that the powers of the Canadian legislature to legislate in customs cases beyond the territorial limits was in accordance with international law and was conferred by the Imperial Parliament by necessary implication. The question of retrospective operation of s. 3 of the Statute of Westminster was expressly left open. They did not go on to express the opinion that s. 3 was unnecessary, which would be the case if Dominion legislatures could pass laws with extra-territorial operation even before the Statute of Westminster, 1931.

In *Governor General in Council* v. *Raleigh Investment Co., Ltd.* [1944], F.C.R. 225 at p. 229, Spens C.J. in delivering the judgment of the Court refers to *British Coal Corporation* v. *The King* [1935] A.C. 500, and cites Lord Sankey, L.C. at p. 518 " In interpreting a constituent or organic statute . . . that construction most beneficial to the widest possible amplitude of its powers must be adopted." The learned Chief Justice adds that " Speaking of the limitation imposed ' by the doctrine forbidding extra-territorial legislation ' the Lord Chancellor observed that that was a ' doctrine of somewhat obscure extent '." But strangely enough in the same sentence the Lord Chancellor was expressing his opinion in favour of the existence of the limitation before the Statute of Westminster. The full sentence is " It is true that before the Statute the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by s. 129 of the Act (the British North America Act, 1867) and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent " [1935] A.C. 500 at 520.

Earlier in the *British Coal Corporation Case* (at p. 516), referring to *Nadan's Case,* the Lord Chancellor observed: " On a careful consideration of the judgment of the Board in *Nadan's Case* [1926] A.C. 482, their Lordships are of opinion that the judgment was based on two grounds only: (1) that s. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865; (2) that it could only be effective if construed as having extra-territorial operation, whereas *according to the law as it was in* 1926 *a Dominion statute could not have extra-territorial operation.*" [1935] A.C. 500 at 516. The Lord Chancellor later again (at p. 522) observed. " Their Lordships do not construe the decision in *Nadan's Case* [1926] A.C. 482 as involving the negation of that general power: the view there stated that the prerogative power to admit appeals could only be abrogated by an Imperial Statute was in their Lordships' opinion based on the special grounds that it would affect matters not confined locally to Canada and would contravene an Imperial Act." In *Nadan* v. *The King* [1926] A.C. 482 at 492 the Judicial Committee observed " But however widely these powers are construed they are confined to action to be taken in the Dominion."

It is clear that in the view of the Judicial Committee, arrived at " on a careful consideration," " according to the law as it was in 1926 a Dominion statute could have extra-territorial operation." Thus according to the Judicial Committee the doctrine of extra-territoriality was applicable to Canadian legislation before the Statute of Westminster. It is submitted that, just as a Canadian law before the Statute of Westminster was to be held bad if " it would affect matters not confined locally to Canada," an Indian or Colonial statute would be bad if it contravened the restriction against extra-territoriality.

In *Governor General in Council* v. *Raleigh Investment Co., Ltd.,* Spens C.J. observed " The question was considered by a Sub-Committee of the Imperial

Conference of 1926,[1] which reported that the subject was full of obscurity and there was conflict in legal opinion as expressed in the courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent" [1944] F.C.R. 229 at 259. Spens C.J. places reliance on this observation.

It is submitted that the basis of *Nadan's Case* as explained by the Judicial Committee in 1935 in the *British Coal Corporation Case* "on a careful consideration of the judgment" is clearly to be followed as against the opinion of the Conference which itself does not deny the existence of the doctrine, but merely refers to the controversy on the subject in 1929.

It may also be noted that Canada passed in May, 1933, the Extra-territorial Act, 1933, declaring that any Act of Parliament (of Canada) passed before December 11, 1931, should have extra-territorial effect which, as a whole or in part, by necessary or reasonable implication was intended to have that effect. The purpose of the Act was to remove the bar of extra-territoriality which existed before the Statute of Westminster, 1931.

In the judgment of the Federal Court of India great reliance was placed on the observations of Evatt J. (as he then was) in *Trustees, Executors and Agency Co., Ltd.* v. *Federal Commissioners of Taxation* [1933] 49 Com. L.R. 220. In this case Evatt J. doubted the existence of the restriction against extra-territorial legislation in the case of Australia in 1933 when Australia had not adopted the Statute of Westminster, 1931. Even if one were to accept the contention of Evatt J. in the case of Australia in 1933, it does not apply to India under the Government of India Act, 1935. Evatt J. based his decision on certain premises which were true in the case of Australia in 1933 but are not true in the case of India under the Government of India Act, 1935. He argued: "It is curious that from time to time questions still arise as to the competence in relation to extra-territorial matters of the Legislatures of the Australian Commonwealth and of the States; for (1) such a power not only pertains to but is an essential part of the conception of self-government; (2) the status of the Commonwealth as a 'self-governing' Dominion was fully admitted at the Imperial Conferences of 1926, 1929 and 1930, and (3) the legislative powers of the Australian State Legislatures are, as so clearly appears from the judgment of Viscount Haldane L.C. in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* [1914] A.C. 237 dealing with the Commonwealth Constitution, of precisely the same general nature and quality as those of the Commonwealth Parliament" [1933] 49 Com. L.R. 220 at 230. As is clear from the quotation, Evatt J. based his decision on the ground of undoubted "self-governing" Dominion status of the Commonwealth of Australia. It cannot be disputed that the Government of India Act, 1935, does not confer self-government on India. The preamble of the Government of India Act, 1919, which has not been repealed by the present Act, makes it quite clear. The Act is passed "with a view to progressive realization of responsible government in British India as an integral part of the Empire." Thus it is clear that the observations of Evatt J. about extra-territorial operation of Australian laws do not apply to India.

In India the power to pass laws with extra-territorial operation may only be deduced either by clear words or by necessary implication in the Act of 1935.

Spens C.J. in the *Raleigh Investment Co. Case* (*supra*) observed "Though the Statute of Westminster is not applicable to India, the Constitution Act of 1935 has to be interpreted in the light of the discussions on the subject that had been taking place between 1926 and 1935," and then compared s. 65 of the Government of India Act, 1915, with the provisions of s. 99 of the Act of 1935. No doubt the extra-territorial powers conferred by s. 99 of the Act of 1935 are wider than the powers under s. 65 of the Act of 1915; but they are clearly

[1] Obviously the reference is to the Report of the Conference on the Operation of Dominion Legislation, 1930, Cmd. 3479.

not intended to be as wide as s. 3 of the Statute of Westminster. Subsec. (2) of s. 99 specifically enumerates cases where " no Federal law shall on the ground that it would have extra-territorial operation be deemed to be invalid in so far as it applies " to enumerated cases (*a*) to (*e*). Spens C.J. observes that " the tenor of the subsection only purports to obviate objection on the ground of extra-territorial operation " [1944] F.C.R. 229 at 261. It is submitted that if this were the intention of the Imperial Parliament the words of the subsection (2) of 99 " no Federal law shall on the ground that it would have extra-territorial operation be deemed to be invalid " were in themselves enough and were also in accordance with s. 3 of the Statute of Westminster, 1931, " It is hereby declared and enacted that the Parliament has full power to make laws having extra-territorial operation." But in s. 99 (2) of the Government of India Act, 1935, the earlier general words are qualified by " in so far as it applies to " the classes of subjects enumerated there. This fact raises a strong presumption that the extra-territorial powers were conferred in specified cases only and the presumption is supported by the maxim of interpretation " Expressio unius, exclusio alterius."

In the Federal Court of India emphasis was laid on the words " Without prejudice to the generality of the powers conferred by the preceding subsection " in s. 99 (2). It is submitted that the words do not mean that s. 99 (1) itself confers full powers of extra-territorial legislation and s. 99 (2) is merely redundant; they do not refer to extra-territorial operation of the preceding subsection and are used to safeguard the generality of the power therein conferred on the Provincial Legislatures " to make laws for the Province or any part thereof."

Spens C.J. also said " That the Federal Legislature's power of extra-territorial legislation is not limited to the cases specified in clauses (*a*) to (*e*) of subsection (2) of s. 99 appears clearly from entry No. 23 of List 1 of the Seventh Schedule relating to " fishing and fisheries beyond territorial waters." It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and Provincial Legislatures the powers which had been conferred by ss. 99 and 100 of the Act." But every subsection of s. 100 must be read with the Lists in the Schedule. The existence and extent of the powers of the Federal and Provincial Legislatures depend upon the very wording in the Schedule to a large extent, since it is there that the detailed description of the power is to be found.

Thus it is submitted that the Indian Legislature does not possess the general power to pass extra-territorial legislation with respect to enumerated subject-matter. The extra-territorial powers of the Legislature are limited to cases where they have been expressly conferred—viz., by clauses (*a*) to (*e*) of s. 99 and Entry 23 of List 1 of the Seventh Schedule of the Act—or where they are conferred by necessary implication, e.g., in cases of police, revenue, public health and fisheries to a reasonable limit farther than the conventional three mile limit of territorial waters,[2] or in cases of expulsion from India to the use of necessary force outside the territory.[3]

It may, no doubt, be desirable in the case of India and the Colonies that they should have powers of extra-territorial legislation; but such power must be conferred by the Imperial Parliament, and so long as this is not done legislation remains subject to the doctrine of extra-territoriality.

[2] *Croft* v. *Dunphy* [1933] A.C. 156.
[3] *Attorney General for Canada* v. *Cain* [1906] A.C. 542.

LABOUR CONDITIONS IN SOUTH AUSTRALIA

[*Contributed by* Miss M. Cecile Matheson.]

We are living in an age of unrest, with its accompaniments of strikes and rumours of strikes, of which one distressing feature is a frequent disregard of duly established and constituted arbitral machinery operated, as it generally is, by administrators of long and comprehensive experience. In some ways history is repeating itself. In 1939 as in 1914, common peril drew the nation together in common effort and aspiration. In both periods continued strain produced reaction, manifesting itself in a sensitiveness that might, with less politeness, be termed irritability with all its suspicious misunderstandings. In the first war period, this reaction was noticeable enough, even before the cessation of hostilities, for the Government to appoint special Committees of Enquiry into Industrial Unrest. We have weathered the later period of trial without any such hindrance to the war effort. Demobilization is proceeding more smoothly, so we may at least hope that history will repeat itself and that the present tendency to rely on force rather than reason will be reversed, as it was in great measure and after many vicissitudes, in an earlier decade.

Under the circumstances, it is interesting and instructive to turn to the South Australian record of arbitrations and awards.[1] Many of the cases cited are founded on previous judgments and are concerned with variations and adaptations. Many are also related to specific trade organizations closely akin to our own Wages Councils, or concern outstanding points after agreement by consent has been reached on most matters at issue between the parties concerned. All this is again proof of the sustained effort in the State to progress by rational methods rather than have recourse to the illogicality of force.

Many of the cases are of purely local interest and some concern individual firms or even individual workers. Others again, require a knowledge of Australian law and practice and are only fully intelligible to such a specialist. In any case, anyone with any experience of drafting industrial awards knows how difficult it is to make these both law-proof and simple enough to be comprehended by the non-legal mind, especially one outside both the country and the industry, though that is an achievement greatly to be desired if the experience of one country is to be helpful to another. Such possible helpfulness may not have been in the minds of the learned Judges of South Australia but we at least owe them thanks for the frequency with which they have given it.

The method of delivering the judgments is in itself very interesting. Every decision is given with the grounds on which it is based, i.e., explanations of previous cases which can be held to establish precedent or throw light on general practice and custom with the reasons for their selection, together with the observations of the Judge himself who, if called on to deal with an industry with which he is unfamiliar, seems always to visit representative firms and so to acquaint himself with actual conditions. Even if in some cases the award seems unduly lengthy and complicated, the volumes are full of interest to the social student, who can glean from the mass of technical details much that is of interest regarding the whole social and industrial outlook in a new country where, as elsewhere, there has been a period of phenomenal industrial development owing to war conditions.

A rise in the cost of living attracts attention here as everywhere else, but in South Australia there is a statutory basic cost of living which can be varied from time to time after official enquiry, and is used as the starting point for debating all questions of wages and conditions.

Such enquiries were made in 1940 and in 1942 and the results are issued as

[1] *South Australian Industrial Reports* (Volume XVI, 1940-1941, Volume XVII, 1942-1943). Edited by G. C. Douglas Bowen. (Adelaide: Government Printer, 1944.) Pp. viii, 420, xi. Pp. viii, 459, xii.

appendices to these volumes. Thus in November, 1940, the Board of Industry declares the "living wage" to be paid to adult male employees in the metropolitan area to be 14s. a day and to females 41s. a week. This replaces a determination of 1938 of 13s. a day for men and 38s. a week for women. In fixing these basic rates, allowances are made for a standard family of a wife and three children, an average rent of about £1 for a house containing four or five rooms and the fact that there are 62 days (Sundays and public holidays) in the year on which no wages will be earned. The Board also takes into account the unsettled and changeable conditions inseparable from a state of war, anticipating a further rise, at least in the prices of clothing, especially women's clothing, for the law forbids a re-opening or review of the question within six months.

Statistical tables are freely used in estimating the cost of living, but, in addition, anonymous advertisements for board and lodging for one or two women were inserted in the press, the replies were carefully examined, and an addition to the figures arrived at was made for clothing and miscellaneous expenditure.

It is interesting to find in the same report elaborate tables which disclose the very large proportion of adult males who had fewer than the accepted trio under 16 dependent on them. In one table, for example, the number of males with three or more such children was only 31.6 per cent. Nevertheless, "it may be mentioned that all concerned have agreed that the living wage to be paid to men ought to be a family wage."

When the whole question of the cost of living is re-opened a year later, in November, 1941, and the men receive an addition to the basic wage of 6d. a day, the women of 2s. 6d. a week, the whole question is reviewed in the light of an interesting innovation which finds its parallel this year in our own country. During the interval a system of family endowment has been introduced giving to each child, after the first, 5s. a week while statistical evidence still inclined to the view that the average family consisted of parents and two rather than three children. The Board "has not, however, felt that it should use the payment of child endowment as any ground for the reduction of its family unit" or take any account of child endowment in computing its living wage, for over seventy per cent. of the adult male wage earners appear to be "single men, men without dependent children or those with only one dependent child. . . . It may be suggested that such people have been fortunate to have received for so long a wage which was calculated in reference to the support of children who are not in fact dependent on them. Be that as it may, the fact is that such a wage has been paid, and the community has accepted and become accustomed to the standards provided by it."

The Board considers that to take account of the new Child Endowment allowance would work unfairly towards men with fewer than three dependent children (the large majority), and "that child endowment should be accepted . . . as a raising of the standard of living for the benefit of the children in all families where there are two or more dependent children."

Fresh enquiries are made in September, 1942, after exhaustive enquiry "as to whether it is now just and expedient that the existing living wages should be re-opened and reviewed." In the interval, national security regulations have insisted that any change made by the Board must be due "solely to actual variations in the cost of living." In other words, the Board is safeguarded against being used as a political instrument for raising the *standard* of living at a time when there is plentiful employment and some scarcity of labour. The wording of the regulations is also held to preclude any allowance for anticipated variations, such as had influenced the decisions of the previous year.

It is found that, in the interval, rents have not changed, but that there

has been a sharp rise in the cost of food and groceries. With regard to clothing, which was especially considered in the previous award, some items are now rationed, many garments are now unobtainable, and probably actual expenditure is much the same while " miscellaneous expenditure " has very slightly decreased.

Advertisements for board and lodging for girls doing their own washing bring forth less response than previously and there is more difficulty in getting offers of single or separate rooms. Otherwise there is not much change and the dominant charge of 25s. seems moderate to English eyes. However, taking a general view, the Board allow for a rise of 2s. 6d. on this item and the final adjudication gives a living wage of 15s. 8d. a day to men and 46s. 2d. a week to women.

It may be remarked that, in these enquiries, as in the cases under review, fewer women are concerned than men.

In the Photographer's Case, the theory of equal pay for equal work is argued at length but without solution, though a plea for investigation is made with a warning that such a new basis of wage fixation, if adopted, should be introduced gradually. The question also arises in the case of certain shop assistants and is again not faced, but at least some women caretakers and cleaners are perhaps somewhat compensated by having their rates based on a 40-hour week, instead of the 44 hours in general use.

As might be expected, the claim for shortened hours seems to be continuous. The 44-hour week seems to have been fairly generally achieved if the cases covered may be taken as a fair sample, and the 40-hour week may be said to be on the horizon. On the other hand, certain chance references lead one to suppose that in some ways the South Australian workman is less well off than his British or his Indian fellow worker, for according to one award three-quarters of an hour for a meal must be allowed in a shift over five hours in length and an employee shall not be compelled to work for more than six hours without a break for a meal. As a result of law, custom and industrial agreement, your Britisher's maximum shift may be looked on as five hours, his meal-break as one hour and his chance of mid-shift refreshment reasonably secure. An allied question that is the subject of much negotiation on both sides of the globe is the annual holiday with pay, apart from and in addition to the usual public holidays, and many are the arguments adduced in its favour, with frequent appeals to British agreements, though the British Draper's Clerks might not consider their claims and conditions exactly comparable to those of Bread-Carters in South Australia.

Legal authorities hold that in South Australia employees generally have no prima facie *right* to annual leave with pay, and, when the question arises, each case is argued on its merits.

Thus, when the Bread-Carters ask for a holiday each month with annual paid leave of twelve consecutive days (excluding Sundays) on the grounds that the early hours of starting work impose undue strain and the exceptionally unhealthy character of the work, their claim is refused, even if the early start on Saturday is admitted to be inconvenient, and they are told to discuss the matter on their Industrial Board. On the other hand, in the Wine and Spirit Industry a week's leave on pay is awarded " on the ground that it has become an established custom in the industry " and the same argument has held good in other cases. The British Tube Mills Case is an example of an industry almost new to the country and provides material for much discussion and adjustment of conditions including most explicit, and it may be added, generous provision for annual leave.

It is evidently felt that the time for a general legal provision is not propitious, however desirable the reform may be in theory. Some industries are in no position to face the cost of such an innovation, while in others no way has yet been devised of overcoming their special difficulties.

It must also not be forgotten that these volumes deal with a country at war (1940-1943) and one learned Judge sums up the position by saying that a claim for annual leave on pay " simply because others already have it must be postponed until a more propitious occasion." Not only is the future too uncertain to involve the State in a large extra cost but no evidence has been presented in proof of the claim that such cost will be offset by the increased productive vigour of the workers. One point constantly borne in mind, indeed, is the danger of adding to the retail prices of the principal commodities by any sudden change.

These reports give the impression of a system that can, however legalistic its position, be administered with a refreshing elasticity and candour worthy of a democracy that prides itself on its educational standard and plans for the future.

" FACT " OR " LAW " IN AMERICAN INCOME TAX LAW

[*Contributed by* A. FARNSWORTH, ESQ., PH.D.]

THE juristic distinction between " questions of fact " and " questions of law " only becomes material where the decision of an inferior tribunal—or fact-finding body such as a jury—is *conclusive* upon all matters of " fact " but is appealable to a superior Court of Record upon any point of law. In this country the General, and Special, Commissioners of Income Tax are, to judge from the number of High Court decisions upon this issue of " fact " or " law," a tribunal *par excellence* whose determinations can be challenged in the Courts only upon the ground that they are " erroneous in point of law."[1] For close upon half a century the courts here have been concerned with delimiting the boundary between " fact " and " law " in Income Tax cases and it may well be doubted whether even now they have arrived at a satisfactory conclusion.[2]

The Supreme Court of the United States has, of recent years, been similarly troubled with this issue of " fact " or " law " as it arises under the Federal Income Tax laws, for a right of appeal to the Federal Courts against determinations of the Tax Court of the United States (previously known as the Board of Tax Appeals) is allowed only where their decisions are " not in accordance with law."[3] Although this restriction of judicial review of the Tax Court's findings has existed since 1926,[4] the Federal Courts do not appear, until very recently, to have accorded these findings the same respect as decisions of other administrative bodies whose findings can similarly be challenged in the courts only where they are " not in accordance with law."[5] This was probably due to the fact that, in the case of the Federal Income Tax, the limitation of the courts' power of review did not come into existence *simultaneously* with the Statute first imposing the tax, or creating the Board of Tax Appeals;[6] as a result, all the courts—including the Supreme Court—have been found adjudicating indifferently upon questions of " fact," as well as of " law," arising under decisions of the Board of Tax Appeals.[7]

[1] S. 149, Income Tax Act, 1918.

[2] See, as to this, an article by the writer, *" Fact " or " Law " in Cases Stated under the Income Tax Acts,* at (1946) 62 L.Q.R. 248 *et seq.*

[3] Internal Revenue Code (1928), s. 1141.

[4] Revenue Act, 1926, s. 1003 (*b*).

[5] See contrasted Supreme Court decisions quoted at 320 U.S., p. 494, note 5.

[6] Following the XVIth Amendment to the Constitution, Federal Income Tax was first imposed by the Revenue Act, 1913. The Board of Tax Appeals was not constituted until the Revenue Act, 1924, while the restriction of the courts' power to review its decisions awaited the Revenue Act, 1926, s. 1003 (*b*).

[7] For examples see cases cited at 320 U.S., p. 498, note 22. Similarly, in this country, we find the judges—in the *early* days of our Income Tax—stating that the sole issue was a " question of fact " and then adjudicating upon it as though it were one of " law," e.g., *Erichsen* v. *Last* (1881) 8 Q.B.D., p. 416, and Esher M.R. in *Werle & Co.* v. *Colquhoun* (1888) 2 Tax Cas., p. 408.

In *Dobson* v. *Commissioner of Internal Revenue* (1943) 320 U.S. 489, the Supreme Court *suo proprio* raised the issue of the extent to which the Federal Courts were entitled to review decisions of the Tax Court merely because of a difference of opinion as to the conclusions which could be drawn from the admitted facts. The following quotation from the unanimous judgment of the Court will show how it met and overcame (*sed quære*) the same problem of differentiating between " fact " and " law " in income tax cases which has equally troubled our courts, viz.: " Perhaps the chief difficulty in consistent and uniform compliance with Congressional limitation upon court review lies in the want of a certain standard for distinguishing ' questions of law ' from ' questions of fact.' This is the test Congress has directed, but its difficulties in practice are well known and have been the subject of frequent comment. Its difficulty is reflected in our labelling some questions as ' mixed questions of law and fact,' and in a great number of opinions distinguishing ' ultimate facts ' from evidentiary facts.[8] It is difficult to lay down rules as to what should or should not be reviewed in tax cases except in terms so general that their effectiveness in a particular case will clearly depend on the attitude with which the case is approached. However, all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision must, of course, have ' warrant in the record ' and a reasonable basis in law. . . . Whatever latitude exists in resolving questions such as those of *proper tax accounting*, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. In view of the division of functions between the Tax Court and the reviewing court, it is of course the duty of the Tax Court to distinguish with clarity between what it finds as a fact and what conclusion it reaches on the law[9] . . . the error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting.''[10]

Although *Dobson's case* has become a " leading " one in American income tax law by virtue of the principle of non-interference with determinations of fact which was laid down therein, the ostensible point at issue was comparatively unimportant. The issue was whether the appellant could be said to have realized a " net gain " in respect of sums recovered by him in proceedings alleging fraudulent misrepresentation as regards worthless shares sold to him. The Tax Court found that, *regarding as a whole the series of transactions* out of which the recovery arose, the taxpayer had derived no economic gain and no " tax benefit." This finding was held to be " purely an accounting problem and therefore a ' question of fact ' for the Tax Court to determine—there was *substantial* evidence to support such a conclusion.''[11] It is interesting to note that the courts in this country equally regard " treating a series of transactions as one for tax purposes " as involving a " question of fact," cf. *Quirke* v. *Pick-*

[8] " Ultimate Facts," or to use the expression adopted by our courts in Income Tax cases—" conclusions of fact," are inferences of fact drawn by a process of reasoning from the " Primary " or " Evidentiary " Facts.

[9] Cf. the remarks, to similar effect, by Lord Simon, L.C., in *Bomford* v. *Osborne* [1942] A.C. 14, as to the importance of the General Commissioners of Income Tax distinguishing, in cases stated by them under s. 149, Income Tax Act, 1918, between their " conclusion of fact " and their " determination in law."

[10] (1943) 320 U.S., pp. 501-2.

[11] *ibid*, p. 504. Note that, in this country, the courts require only " some " evidence to justify the Commissioners' " conclusion of fact," e.g., *New Zealand Shipping Co. Ltd.* v. *Stephens* (1907) 20 T.L.R. 167 (C.A.), and *I.R.C.* v. *Lysaght* [1928] A.C. 234. In America, however, " substantial " evidence seems to be required.

ford,[12] where a decision of the Special Commissioners of Income Tax that the " turning over of a mill " on four separate and distinct occasions amounted to the " exercise of a trade " was held to be an unreviewable " conclusion of fact."

Subsequent applications by the Supreme Court of the rule in *Dobson's* case show, not unexpectedly, that the use of the term " tax accounting " to define a " question of fact " still leaves room for confusion; on the other hand, the Supreme Court has applied, fairly consistently, the principle enunciated in that case of the finality of the Tax Court's determination upon all real " questions of fact."

In *Dixie Pure Products* v. *Commissioner of Internal Revenue*[13] it was held to be a matter of " proper tax accounting "—and accordingly a " question of fact "—whether a deduction in computing profits could be made for State taxes whose imposition was being challenged by the taxpayer in the courts and for which he was ultimately held not to be liable. On the other hand, the Supreme Court held, in *Security Floor Mills Co.* v. *Commissioner of Internal Revenue*,[14] that it was a " matter of law " whether the accounts of a taxpayer could be *reopened* for a past year so as to allow the adjustment of items considered to be proper to such year; it was laid down as a matter of law that income must be credited either in the year of actual receipt or when the right to receive it had become final and definite in amount. This point seems, however, to be clearly one of " tax accounting " and in this country has been held to be a " question of fact," see *Lambert* v. *Inland Revenue Commissioners*[15] and *Worsley Brewery Co., Ltd.* v. *Same*;[16] for this reason Jackson and Douglas JJ., dissenting, considered that the issue was governed by the rule laid down in *Dobson's* case.

In *Commissioner of Internal Revenue* v. *Scottish American Investment Co., Ltd.*,[17] the Supreme Court reiterated in strong terms the principle it had enunciated in *Dobson's* case, viz.: " The Tax Court has the primary function of finding the facts in tax disputes, weighing the evidence and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable. The courts have no power to change or add to those findings of fact or to reweigh the evidence . . . the appellate courts are limited to a determination of whether the findings have any substantial basis in the evidence . . . we do not decide or imply that contrary inferences and conclusions . . . are entirely unreasonable. We merely hold that such contentions are irrelevant so long as there is adequate support in the evidence for what the Tax Court has inferred."[18] In this case the Tax Court had held, after reviewing the mode in which the respondents carried on their business in America, that they had an " office or place of business " in the United States where a very large part of the affairs of the Company in that country were taken care of; accordingly the respondents ranked as a " resident foreign corporation " for the purposes of the Federal income tax.[19] The decision that this determination was one of " fact " reminds us of the somewhat similar decision by the House of Lords in *De Beers*

[12] (1927) 44 T.L.R. 15 (C.A.). See also *Martin* v. *Lowry* [1927] A.C. 312, as to it being a pure question of fact whether the activities of the taxpayer amount to the " exercise of a trade."

[13] (1944) 320 U.S. 516.

[14] (1944) 321 U.S. 281.

[15] (1927) 12 Tax Cas. 1053 (C.A.) cf. Lord Hanworth, M.R., at p. 1073: " Whether a profit belongs to a particular period or not . . . is really a question of fact and has been determined on the facts by the Commissioners."

[16] (1932) 17 Tax Cas. 349 (C.A.). See also earlier cases cited there on this issue of " reopening " past accounts.

[17] (1944) 323 U.S. 119.

[18] *ibid*, pp. 123 & 125.

[19] S. 231 (*b*) Revenue Acts, 1936 and 1938.

Consolidated Mines, Ltd. v. *Howe,*[20] where it was held that a finding by the General Commissioners of Income Tax, that the " central control and management " of a foreign company was in this country, was a pure conclusion of fact unimpugnable in the courts since there was evidence to support it.

The Supreme Court subsequently upheld the Tax Court's findings as " matters of fact " within the rule in *Dobson's* case in *Claridge Apartments Co.* v. *Commissioner*[21] as to the propriety of deductions for repairs to property, in *Choate* v. *Commissioner*[22] as to the " intention " of the taxpayer in selling plant, and in *Commissioner v. Flowers*[23] as to whether travelling expenses incurred by the taxpayer had a direct connection with his business activities. In *Commissioner* v. *Tower*[24] the finding of the Tax Court that there was no real partnership between husband and wife was held to depend on the " intention " to create a partnership, and this was a " question of fact " to be determined from the testimony and the conduct of the taxpayers in the execution of the partnership agreement. In this country, too, the courts have repeatedly held, in income tax cases, that the existence of a partnership was a " question of fact " not to be concluded by there being a piece of paper called a partnership deed.[25]

Further similarities in the attitude of the courts of the two countries are to be found in the following cases. In *Boëhm* v. *Commissioner of Internal Revenue*[26] Murphy J., in delivering the unanimous judgment of the Supreme Court, said: " But the question whether particular corporate stock did or did not become worthless during a given taxable year is purely a question of fact to be determined . . . by the Tax Court. . . . *The circumstance that the facts in a particular case may be undisputed* does not make the issue any the less factual in nature. The Tax Court is entitled to draw whatever inferences and conclusions it deems reasonable from such facts. And an appellate court is limited . . . to a consideration of whether the decision of the Tax Court is ' in accordance with law.' If it is . . . it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts."[27] This view accords with the rejection by the House of Lords, in *Ushers Wiltshire Brewery, Ltd.,* v. *Bruce,*[28] of the doctrine adumbrated by the lower court that, where all the facts are admitted or not in dispute, the issue must be one of law.[29]

In *Commissioner* v. *Wilcox*[30] it was held that the Tax Court's determination that embezzled money constituted taxable income to the embezzler involved a " clear cut mistake of law." This decision reminds us of the somewhat similar one in *Curtis* v. *J. G. Oldfield, Ltd.,*[31] where it was held, in effect, to be a matter of law that moneys withdrawn for his personal use by a director of the company were *dehors* the trade altogether so far as the tax position was concerned.

[20] [1905] A.C. 455.
[21] (1944) 323 U.S. 141.
[22] (1944) 324 U.S. 1.
[23] (1945) 326 U.S. 465.
[24] (1946) 90 L. ed. 559.
[25] See *Hawker* v. *Compton* (1922) 8 Tax Cas. 306 & *Dickenson* v. *Gross* (1927) 11 Tax Cas. 614.
[26] (1945) 326 U.S. 287.
[27] *ibid,* p. 293.
[28] [1915] A.C. 433 and especially judgment of Lord Parmoor at p. 465; *see also* Lords Atkinson & Sumner at pp. 449 and 460.
[29] " When the various circumstances and facts, upon which the question depends are established and found, the *proper inference to be drawn . . . is a question of law.* An analogous example of such a question . . . is that which constantly arises . . . where the County Court judge has found *all the material facts* relating to the accident to the workman and this court has to determine as a matter of law . . ."; [1914] 2 K.B. at p. 901.
[30] (1946) 90 L. ed. 353.
[31] (1925) 94 L. J.K.B. 653.

Divergences in the views of the American and British Courts as to what constitutes a " question of fact " in these income tax cases are revealed in the two cases now discussed. In *Bingham's Trustees* v. *Commissioner of Internal Revenue,*[32] it was held that: " The Tax Court could find as a matter of fact that the expenses (of the trustees) of contesting the income tax assessment were a proximate result of the holding of (trust) property "[33] and therefore an allowable deduction for tax purposes.[34] In effect the Supreme Court held it to be a " question of fact " whether certain expenses could be considered to be " expenses of management of property." In *Southern* v. *Aldwych Property Trust, Ltd.,*[35] it was assumed by the court here, on the contrary, to be a " question of law " whether the costs of advertising the company's properties were an " expense of management " of an investment company.[36]

Bingham's case is, however, of more than ordinary importance for an interesting concurring opinion by Frankfurter J., in which he endeavoured to clarify the course of decisions of the Supreme Court since the *Dobson* case by a discussion of the juristic difference between " questions of fact " and " questions of law "—" legal concepts," as he said, " around which dialectic concepts have been fought time out of mind." Frankfurter J. considered that these concepts were unmanageable and confusing: " unless they have invariant meaning, that is, unless they serve the same purpose for every legal purpose for which they are invoked." He drew a distinction between what was a " question of fact " as between a judge and a jury and what was one as between the Tax Court and the Federal Courts; he considered that the historical demarcation between " fact " and " law " in jury decisions was not applicable to findings of the Tax Court, who should, accordingly, have the final say in the construction of documents and statutes ! In the opinion of the learned Justice " questions of fact " peculiarly within the province of the Tax Court were: " Disputed questions regarding events and circumstances . . . and of what happened as a matter of business practice or relevance. . . . The authority which Congress gave to the Tax Court involves a determination of what really happened in a situation and what it means in the taxing world."[37]

Talbot Mills v. *Commissioner of Internal Revenue*[38] reveals yet another striking divergence of view between the courts here and in America. In this case the Supreme Court held that the principle in *Dobson's* case applied as regards the nature of payments made by a corporation to holders of its obligations so that the inference to be drawn from the primary facts as to whether these payments were in the nature of " interest " or " dividends " was one of fact for the Tax Court. This decision accords with the earlier one of *Equitable Life Assurance Society* v. *Commissioner,*[39] where it was held that " excess interest dividends " paid by the company could not be said to be, *as a matter of law,* interest within the meaning of the statute,[40] so that the decision of the Tax Court accordingly stood. In this country, on the other hand, the nature of a

[32] (1944) 325 U.S. 365.

[33] *ibid,* p. 376. s. 23 (*a.* 2), Internal Revenue Code (1938), allows a deduction for " expenses of management . . . of property held for the production of income " provided that they are " ordinary and necessary." The majority of the court held (*ibid,* p. 371) that the meaning of these words in the Statute was a " matter of law " but that " questions of reasonableness and proximity " were " matters of fact " for the Tax Court.

[34] In this country the costs of contesting a tax appeal have been held *not* to be an allowable deduction in computing trade profits, *Allen* v. *Farquharson Bros.* (1932), 17 Tax Cas. 59. See, however, *Rushden Heel Co. Ltd.* v. *Inland Revenue Commissioners* (1946), 2 A.E.R. 141, to the contrary.

[35] [1940] 2 K.B. 266.

[36] *See* s. 33, Income Tax Act, 1918.

[37] *ibid,* pp 376-383.

[38] (1946) 326 U.S. 521.

[39] (1944) 321 U.S. 560.

[40] S. 203 (*a.* 8) Revenue Act, 1932.

company's obligations has always been held—without any dispute—to be a question of law.

It will be interesting to see how, in the years ahead, the Supreme Court develops the principle of the finality of the Tax Court's determinations of fact, as laid down in the *Dobson* case, and to what extent its decisions will approximate to those of our courts on the difference between " fact " and " law " in income tax cases.[41]

TRIAL BY JURY IN INDIA

[*Contributed by* A. G. P. PULLAN, ESQ.]

TRIAL by jury in so far as it is now the law of India is a Western innovation. It is true that in the earliest times known to us justice was administered by arbitrators known as Panches or Panchayats (literally boards of five) chosen from the particular caste, tribe, trade or locality to which the parties belonged; but there is little in that system analogous to English Trial by Judge and Jury in criminal cases, and no attempt has been made as yet to introduce into Indiia Trial by Jury in civil cases.

At first the British accepted the criminal law of the country as they found it. This was the Moslem law in Bengal and Madras, and the Bengal system was extended towards the North West as other Provinces came under the control of the East India Company. Only in the Bombay Presidency, where the Mahrattas had never been subjugated by the Moghuls, and remained the predominant race, Hindu law for Hindus and English law for Christians and Parsis became the rule.

Under the Moslem law the trial of criminal cases was entrusted to a judge, with two assessors learned in the Sharia (Moslem law), and though in course of time under British administration European judges were appointed, they also sat with Moslem lawyers as assessors.

But as Lord Bryce said: " It was inevitable that the English should take criminal justice into their own hands—the Romans had done the same in their Provinces—and inevitable also that they should alter the Penal Law in conformity with their own ideas."[1]

The Trial by Jury of capital crimes committed by the Company's servants was enacted by an Ordinance of James I dated 1623/4, and jury trial became the rule for criminal trials on the original side by the Supreme Court in Calcutta. This system passed on naturally to the Chartered High Courts, but this involved so small a part of the volume of criminal cases as to be negligible, except in so far as it provided an exemplar for the establishment of juries in the ordinary Courts of Session.

From 1793 onwards a series of Ordinances whittled away those provisions of the Moslem law which offended against European sensibilities, and a new system was launched by Act VI of 1832, which enabled judges to avail themselves of the assistance of respectable natives as panchayats in the decision of suits or trials. The final decision did not rest with these panchayats, but it certainly appears that this was intended to be the thin end of a wedge for the gradual introduction into India of the British jury system.

The attempt was not successful, indeed Sir George Campbell, writing in 1852, described it as an entire failure. He said: " No one is compelled to serve on the jury. It is alien to the feelings and customs of the country, and the Panchayat or Jury of arbitrators chosen by the parties to decide between them in a civil case is a native institution, but to be summoned by Government to

[41] *See* note 2 *ante*.

[1] *Studies in History and Jurisprudence*, Vol. I, p. 120.

decide on the guilt or innocence of a person in whom they take no interest is a hardship and unprofitable responsibility much disliked by natives."[2]

Although Sir George Campbell's views were widely shared by British Indian Administrators, after the transfer of power from the East Indian Company to the Crown, jury trials were established tentatively in the Sessions Courts under the Criminal Procedure Code of 1861 (Act XXV of 1861). The provisions of the Act as to Jury trials were, however, applied only to such districts and for the trial of such offences as might be ordered by the local government, which could revoke or alter such order from time to time. Actually the system was applied in Bengal to the environs of Calcutta, to Dacca and to Patna, and then to the whole of Assam; in Bombay to Poona, and in Madras for offences against property, theft, robbery and house-breaking to certain important centres. In all other sessions districts and for other offences, trial with the aid of assessors was the rule, as is still the case in the greater part of India. A judge sitting with assessors, who must be two or more, generally either three or four in number, is required to record their opinion, but is in no way bound to follow it. An inconvenient result of this system is that in those areas where the jury system is applied to certain crimes only, in those numerous trials in which persons are charged both with crimes triable by jury and with crimes triable with assessors, the same persons sit both as jury and as assessors, and give a verdict on one part of the case, and an opinion only on the other. A typical case arises where the accused persons are charged with dacoity, triable with assessors, and with disposing of stolen property, triable by jury. This procedure, which is imposed by statute, leads to many anomalous decisions.

The Code of 1861 provided no appeal from a conviction except on a question of law, and no appeal against an acquittal. The powers of the trial judge were confined to accepting the verdict of a preponderating proportion of the jurors, namely, six out of a jury of nine, five out of seven, and four out of five, the latter being the minimum number of jurors, and to ordering a retrial if that proportion was not attained. An inconclusive verdict on retrial involved an acquittal.

It soon became apparent that these provisions called for drastic amendment, in view of the difficulty of obtaining a conviction even in clear cases, and the legislators got to work again. A new Criminal Procedure Code came into being in 1872 (Act X of 1872) which repealed the Act of 1861 and introduced the following main alterations in procedure: (*a*) the minimum number of jurors in sessions trials was reduced to three; (*b*) it was enacted that if the court disagrees with the verdict of the jurors or of a majority of such jurors, and considers it necessary for the ends of justice, it may submit the case to the High Court, and " the High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so shall pass such sentence as might have been passed by the Court of Session "; (*c*) the local government may direct an appeal from an order of acquittal. As before an appeal from a conviction lay only on a question of law.

The power of reference by the trial judge, and the jurisdiction given to the High Court on such a reference have remained on the Statute Book to the present day, together with the power given to the local government to appeal against an order of acquittal. All these provisions have been the subject of case law and there have been two later Acts, namely, the Codes of 1882 and 1898, but despite modification in the use of the powers so conferred, the principles remain unchanged.

On the whole the courts in India have always been reluctant to go the full length apparently sanctioned by the Act of 1872, namely, to disregard the jury's finding altogether when the trial judge has disagreed with the verdict and

[2] *Modern India*, p. 473.

referred the case. Thus at the very outset in 1873 a Bench of the Calcutta High Court, Macpherson and Morris JJ. ruled: " I think we ought not to interfere with a verdict, unless we can say decidedly that we think that it is clearly wrong. If we are to interfere in every case of doubt—in every case it may with propriety be said that the evidence would have warranted a different verdict—then we must hold that real trial by jury is absolutely at an end, and that the verdict of a jury is of no more weight than the opinion of assessors. I presume that if this were the intention of the Legislature, it would have said so, but the Legislature has not said so."[3]

Act X of 1882 fixed the number of jurors in the High Court at nine, and retained a minimum of three for Sessions Courts. It altered the wording of the section dealing with reference by the trial judge as follows: " If in any such case the sessions judge disagrees with the verdict of the jurors or of a majority of the jurors, on all or any of the charges on which the accused has been tried, so completely that he considers it necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed. In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, but it may acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it."

The powers of the High Court in a normal appeal from a jury were restricted as follows: " Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection of the judge or to a misunderstanding on the part of the jury of the law as laid down by him." These words however were not taken to debar the High Court from interfering with a verdict on the facts in a case under reference.

The present Act (V of 1898) laid down the number of jurors as nine in the High Court and from five to nine in a Sessions Court, " but not less than seven or if practicable nine when the offence charged is punishable with death." In this Act for the first time a guide is given to the High Court as to their treatment of the verdict of the jury by the addition of the following provision in s. 307: " In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on appeal, and subject thereto it shall after considering the entire evidence and after giving due weight to the opinions of the sessions judge and the jury acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it."

On these sections many decisions of the Indian Courts have been based. The preponderance of opinion is in favour of the view that on a reference the High Court should not reverse the verdict of the jury, whether unanimous or of a majority unless it is in some way perverse or unreasonable, or, as other judges have said, such as a reasonable body of men could not have given. The other school of thought, relying possibly more strictly on the letter of the law, have held that the High Court can review the whole case and substitute their own opinion for that of the jury. In some cases they have acted as though they had to decide between the trial judge and his jury, and one judge at least of the Calcutta High Court expressed a decided preference for the opinion of the judge on the ground that " he has been trained to weigh and appreciate evidence and further must give reasons for his opinion."[4]

[3] *Queen* v. *Sham Bagd*, xiii Bengal Law Reports (Cr), p. 19, appendix.
[4] *Emperor* v. *Ram Chamdra Roy*, I.L.R. 55. C., p. 579 at 886.

The powers of the High Court on appeal by the Local Government from an order of acquittal by a judge sitting with assessors are extensive. At one time a view was held that the High Court should not interfere unless the lower court had "obstinately blundered," or "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice." But in 1934 the Privy Council, Lords Blanesburgh, Thankerton, Russell of Killowen and Sir Shadi Lal, decided in *Sheo Swarup and others* v. *The King Emperor*[5] that no limitation should be placed on the power of the High Court, unless it be found expressly stated in the Code, and there is nothing to prevent the application of the same principles to appeals from an acquittal by a jury.

Two cases have been decided by the Privy Council recently, in which the powers given by the Legislature to the Indian High Courts have been considered, the first on an appeal, and the second on a reference by the trial judge.

In the first case, *Abdul Rahim* v. *The King Emperor*,[6] decided on February 26, 1946, by Viscount Simon, Lords Macmillan, Wright and Simonds and Sir John Beaumont, the Board had to consider whether the High Court was empowered (1) when it is found that inadmissible evidence has been admitted in a jury trial, to exclude such evidence and maintain a conviction if the evidence remaining is sufficient to warrant it, and (2) when it is found that there have been serious instances of misdirection and non-direction of a jury, to proceed itself to consider the evidence, and maintain a conviction if the evidence is sufficient.

In deciding both questions in the affirmative the Board reviewed the law as stated above, and two general sections, namely, s. 537 of the Criminal Procedure Code and s. 167 of the Indian Evidence Act (I of 1872), which operate to restrain appellate courts from interference either on the ground of misdirection or of improper admission of evidence unless such an error has occasioned a miscarriage of justice, or there has been no other sufficient evidence apart from the evidence improperly admitted. The opinion of the Board, delivered by Lord Macmillan, proceeds: "No one can read these statutory enactments without realizing the wide disparity between the law of India and the law of England in their respective attitudes to the verdict of a jury in criminal cases. In India the law is purely the creation of statute, and the introduction of the system of jury trial among a people who had no previous experience of its working was not unnaturally accompanied with safeguards and modifications appropriate to such circumstances. In England, on the other hand, trial by jury, the palladium of British justice, as Blackstone terms it, is an institution deeply rooted in the minds and habits of the people, with which they have been familiar from time immemorial. It is therefore not surprising to find the verdict of a jury treated differently in Indian criminal legislation. To emphasize the difference it is enough to point out that the statute law in India in certain circumstances permits an appeal against a jury's verdict of acquittal, and authorizes the Appellate Court to substitute a conviction on its own consideration of the evidence. Time and again eminent judges in India have drawn attention to the importance of bearing these circumstances in mind, and the danger of allowing preconceptions derived from English practice to influence the decision of Indian cases (see for example the observations of Jackson J. in the case of *Elahee Buksh* (1866) 5 *Sutherland's Weekly Reporter*, 80 at p. 94). This is not to say that the verdict of a jury is to be lightly regarded in India. Far from it. The Legislature has enjoined Appellate Courts expressly to pay regard to it. But at the same time it has thought it right and necessary in the circumstances of India to confer upon Appellate Courts extensive powers of over-ruling or modifying a verdict in the interests of the due administration of justice, confident that the appellate judges

[5] *Sheo Swarup and ors.* v. *K.E.*, I.R. 61 I.A., p. 398.
[6] (1946) 73 Ind. App. 77.

who have not themselves seen and heard the witnesses, will not exercise lightly the responsible power entrusted to them."

In the second case, *Ramanugrah Singh* v. *The King Emperor*, decided by Lords Thankerton, Porter and du Parcq, Sir Madhavan Nair and Sir John Beaumont on June 18, 1946,[7] the Board had for its consideration a case in which three men were shot, two wounded only and one killed. The jury found the accused guilty of shooting and wounding the two men who survived, but not guilty of the murder of the third man. The judge, disagreeing with the jury as to the murder, referred the case to the High Court and expressed the view that the verdict of the jury was contradictory, and that a conviction for culpable homicide not amounting to murder (manslaughter in England) was the proper verdict. The High Court went through the whole of the evidence and found that in their opinion a charge of murder was made out, and passed sentence of transportation for life.

The opinion of the Board, delivered by Sir John Beaumont, after setting out the relevant section of the Code, s. 307 of the Code of Criminal Procedure, Act V of 1898, proceeds: "Under subsection (1) two conditions are required to justify a reference. The first that the judge must disagree with the verdict of the jury calls for no comment, since it is obviously the foundation for any reference. The second that the judge must be 'clearly of opinion that it is necessary for the ends of justice to submit the case,' is important and in their Lordships' opinion provides a key to the interpretation of the section. The Legislature no doubt realized that the introduction of trial by jury in the Mofussil would be experimental and might lead to miscarriages of justice through jurors in their ignorance and inexperience returning erroneous verdicts. Their Lordships think that the section was intended to guard against this danger, and not to enable the Sessions Judge and the High Court to deprive jurors acting properly within their powers of the right to determine the facts conferred upon them by the Code. If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions Judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine the facts . . . . In their Lordships' view the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail since they are the judges of fact."

In the case under consideration the High Court passed no criticism on the jury's verdict, and it was clearly a verdict which might have been given in good faith by reasonable men, and the Board by adopting in the main the view of those Indian High Courts which have held that a reasonable verdict should not be set aside merely because the High Court takes a different view of the evidence, have set a long-drawn controversy at rest.

The result of these two decisions is to strengthen the position of the juries in India, by assuring them of support as long as they give a reasonable verdict (1) in cases where inadmissible evidence has been put before them but where apart from that inadmissible evidence there is sufficient material for their verdict, and (2) in cases where the trial judge and the High Court on reference do not agree with the view taken by them. But the jury is still in tutelage. It functions in a relatively small part of India and is subject to safeguards unheard of in this country. We have reached a point at which it has been recognized

[7] Not yet reported.

by the highest judicial tribunal in the Empire that the voice of the jury must be heard, and its verdict accepted on facts, unless the verdict is perverse or unreasonable, but as long as the provision remains that in such an event the High Court can review the evidence and substitute its own finding, the Indian jury will not attain the status of an English jury.

Unfortunately, those who have most experience of Indian juries do not think highly of them. They have been drawn from persons of ordinary status, and it cannot be said that their fellow-countrymen regard them as either impartial or incorruptible. In racial and communal matters especially no one would willingly submit to a decision by a jury of another race or other beliefs. From the first it was found necessary to grant to Europeans, whether British subjects or otherwise, and Americans a right to have a majority of the jury composed of Europeans or Americans, and at the present time an Indian British subject can claim a majority of Indians. The extensive grounds on which a challenge is allowed are instructive. Among them are (*a*) some presumed or actual partiality in the juror, (*c*) his having by habit or religious vows relinquished all care of worldly affairs, and (*g*) his inability to understand the language in which the evidence is given, or when such evidence is interpreted, the language in which it is interpreted.

That such rules are required is an indication of the vast nature of the task undertaken in introducing jury trials in a country made up of many opposing faiths, and countless racial and linguistic differences, where the ideal of many of the best citizens is complete renunciation of worldly affairs, and the standard of general education is low.

The history of this experiment already lasting for over a century is not encouraging. The seed has been sown and resown, and watered and tended with care and perseverance, but the root has not struck deep in the heart of the peoples of India. English law has done much for India, and it can hardly be doubted that in many directions it has affected the administration of justice for all time, but it is open to question whether any purely Indian administration, such as is contemplated at the present time, will find any place for the jury system.

SOME GERMAN VIEWS ON THE CONFLICT OF LAWS

[*Contributed by* PROFESSOR B. A. WORTLEY.]

THE fall of Constantinople, the Edict of Nantes and the Nazi persecutions have all produced new contributions to European learning and scholarship. And if exiled scholars have brought fresh minds to the problems of their new colleagues, it is equally true that the exiles themselves have learned something from their new surroundings.

Three remarkable recent books on the Conflict of Laws[1] afford an opportunity to say something about the Anglo-German scholastic interpenetration of recent years.

Born in Austria in 1874, after a distinguished career at the Bar, on the Bench and in University life, Ernst Rabel was for many years Director of the "Kaiser Wilhelm Institute of Foreign and Private Law in Berlin." His range of activities has been prodigious. We are told (Rabel, p. vii, *et seq.*): "He first introduced the comparative study of Egyptian papyri with medieval.

[1] *The Conflict of Laws*, a comparative study, by Ernst Rabel, 1945. (Ann Arbor, The University of Michigan Press; Chicago. Callaghan & Company.) lvi + 745 (including Bibliography and Indices).

Private International Law, by Martin Wolff. (Oxford University Press, 1945.) lxiii + 637 (including index).

A Textbook of the English Conflict of Laws, by Clive M. Schmitthoff, 1945. (London, Sir Isaac Pitman & Sons, Ltd.), xlvi + 455 (including index), 35s.

documents, he is a leader in the efforts, through the modern search for interpolations, to reconstruct the original Roman private law; . . . these broad interests were complemented by intensive comparative work on modern Swiss, French and German laws, later including the common law as well . . . he practised law in Vienna and served as judge in the Appellate Courts of Bâle and Munich. Shortly after the first World War he became a member of the German-Italian arbitral tribunal. As a judge of the Court of International Justice . . . at the Hague, he took part in German and Polish suits. He was president of the International Association of Comparative Law and a member of the Council and Executive Committee of the Institute for the Unification of Private Law in Rome." . . . " In 1937 the Nazi insanity removed from the directorship of the world's then principal organization devoted to the Study of Comparative Law the director, whose foresight and leadership conceived and conducted it."

Dr. Rabel's recent American publication has been described as the confirmation of his life work. " Its primary purpose is to make a comparison of the significant legal systems of conflict of laws with reference to the specific problems arising in each topic." This first volume, now available, is a general introduction to the subject and deals also with the law of persons; it was produced by Rabel, working first with the American Law Institute and later at the Law School of the University of Michigan, with Yutema. We shall look forward to other projected volumes. Rabel's work constantly bears the American reader in mind and pays special regard to the American Restatement of Conflict of Laws.

Martin Wolff, as he is simply described in his comprehensive book on Private International Law, gives no clue to his distinguished past history. The terse preface to his book merely records his gratitude to his son Victor, who died in 1944, and to All Souls', who gave him a chance to write the book. This book is new, Wolff's elementary German book of 1933, written when he was Professor at Berlin University, dealt with the German approach to private international law,[2] " the present treatise therefore covers different ground and is neither a translation nor a second edition of the earlier German study." If the emphasis of Rabel's book is American, the emphasis in Wolff's is indeed essentially English.

The third German university man, Schmitthoff, also writes mainly from the English law standpoint. Schmitthoff may, we presume, not unfairly be taken as representative of that younger generation of German Doctors of Laws who have come to this country, have taken their LL.M. of London, have been called to the Bar, and have served in the British army in the recent war. Schmitthoff's work, which presents the rules of the English Conflict of Laws in a concise manner, was completed before the war, which delayed its publication, but has been brought up to date.

All three writers show the remarkably wide sweep which can be acquired by a study of comparative law. Their work is well written and clear. We have observed very few foreign turns of phrase[3] in their style, and a remarkable

[2] " Internationales Privatrecht," in the *Enzyklopädie du Rechts—und Staatswessenschaft*. (J. Springer, Berlin, 1933), 159 pp.

[3] To select a few examples: Speaking of *renvoi*, Rabel (p. 77) says, " What then of the mirror cabinet?" And, at p. 3, " In this country, likewise, rules relative to foreign individuals—aliens and non-residents—*typically do not appear* in the treatises on conflicts law." At p. 122 " The recent *unrest of legislation* respecting married women has engendered other cases." At p. 395, " The Divorce mills complete the evils of *familial* maladjustments." At p. 658 " The statute of distribution may allow a share to all children, *inclusive of illigitimates* . . ." " The right of an unwed (sic) mother to claim support from the illigitimate father of her child " (p. 53).

Wolff, p. 364, speaks of " acquests " and, at p. 153, of " a marriage concluded in England between two domiciled Frenchmen " ! Schmitthoff often alludes to " conflictual rules " and also speaks of the marriage of a " lady and a gentleman " (p. 277) and at p. 312 of " a marriage celebrated in England *by English subjects*."

absence of misprints for works containing so many recondite references.[4] Nevertheless, the categories of thought, or rather the expressions used, are often German and may seem somewhat novel to English minds.

Rabel (pp. 42–43) and Wolff (pp. 98–99) speak of " points of contact " or " connecting factors," Anknüpfungspunkte, points de rattachement, momenti di collegamento. Schmitthoff speaks of the " problem of connection " (p. 46).

Wolff's list (p. 125) of the cases where a person's status is affected by nationality under the English system is useful. But we do not see any value of talking about nationality or domicil as " connecting factors " in matters of status in conflict of laws, since the exceptions to the domicil rule are purely arbitrary and do not depend on principle. Rabel says (p. 42): " the legal effects of an ordinary rule of law are fully indicated; the question raised is immediately solved by commanding or prohibiting or authorizing certain conduct. (' Material,' ' substantive,' ' internal ' rules, in German, *Sachnormen*.) In contrast, conflicts rules decide only *which state* shall give such immediate solution. The specific quality of these rules resides therefore in the second part, *which declares the municipal law to which the question should be referred* or connected (in German ***anknupft***)."

It will be noticed that the emphasis is throughout upon " States." Now, we do not see that this approach helps an understanding of the English attitude, though it certainly helps the English to understand the continental approach. Cheshire says, in our opinion rightly, " *that part of English law* known as private international law comes into operation whenever the court is seized of a suit that contains a foreign element " (2nd ed., p. 3). Dicey (5th ed., p. 18) takes a similar view: " English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country." And we like Schmitthoff's view when he (p. 31) says, " the English system of conflict of laws is concerned with the protection of vested rights "; though in his definition of conflict of laws he speaks of " that branch of the municipal system of law, which in disputes extending over several legal units, determines *which law is applicable* to the issue or which court has jurisdiction to adjudicate upon the issue " (p. 4). We cannot accept Rabel's (p. 61) contemptuous dismissal of " Dicey's and Beales' attempt to reanimate the theory of vested rights," now in his view, " critically destroyed," nor do we agree with Wolff (p. 254) that that theory " begs the question by pre-supposing a right as acquired while the problem is just whether it is acquired." Nor do we agree with Wolff (p. 497) it is a " regrettable principle that the English court is required in actions for tort to apply English law and not the *lex loci delicti*."

The main reason for our difference of opinion is that, in our view, the English Courts have their own well-established standards of justice to apply *to anyone* coming before them who thinks he has suffered a wrong. In our submission, the approach which seems to assume that the conflict of laws is not so much concerned with claims of right, but with the competing claims of national laws, is not a suitable one for English students. The English courts, it seems to us, proceed in their deliberations from concept of the individual reasonable man and not from that of the nation. The developed common law is by tradition an instrument for justice based upon the conception of any man having rights arising from the mere fact of his personality as a man, not from his acquiring them from the law of a national State. Wolff rightly points out (p. 54) that, subject to the rules about enemy aliens, sovereigns and diplomats, " under English law any person, whether a British subject or an alien, may sue or be sued in the English courts. . . . Unlike most continental laws, English law does not *require* an alien plaintiff to furnish security for costs (*cautio judicatum*

[4] e.g., Wolff, p. 136, note 6; Schmitthoff, p. 336, note 5, and p. 228.

solvi)." Since the abolition of the legal effects of foreign slavery in England, with Lord Mansfield's decision in *Somersett's* case, English law may claim to have recognized, in the words of the charter of UNO, " the fundamental human rights . . . the dignity and worth of the human person . . . " Nor should the terms of the English judicial oath be forgotten in this connection. It is: " to do right by all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will."[5]

Because of the values preserved by English courts, English lawyers do not find it strange that English courts presume foreign law to be the same as their own until the contrary be proved (Schmitthoff, p. 369); we cannot therefore agree with Wolff (p. 223) that this is a " regrettable solution." We think, too, that the English rule that foreign law must be proved each time to the judge, and that once found as a fact foreign law does not constitute a binding precedent, is sound practice in a world of changing sovereignties and *jurisprudences inconstantes*. We do not think, as Wolff suggests (p. 222), the judge will presume that when the parties have proved what the foreign law was at a particular time in the past, " the court will probably have recourse to the general principle that what has existed once is presumed to continue in force unless the contrary is proved."

Moreover, the common law, by its spread throughout the English-speaking world, has a claim to be considered as a system of values far transcending mere national law. We do not think, therefore, that adherence to common law values would in any way therefore amount to a " subservience to subjection and local values," which Rabel (p. 91) fears. Rabel may be right as regards many places when he says (p. 89) that " a just result *or the realization of prescribed policies* is now often viewed as the main purpose of conflicts law "; but the common law judges, we believe, accept the objective of a just result rather than the realization of *prescribed policies*. By sticking to their conception of justice English courts often avoid ridiculous results of which a purported adherence to State policy may bring. For instance, Rabel points out that by the Hague Convention on marriage laws, to which Great Britain is not a party, the law of the place of celebration may permit the marriage of foreigners contrary to their national laws, if these prohibitions are based exclusively on grounds of a religious nature. " The other States are entitled to deny a marriage contracted under such circumstances recognition as a valid marriage " (p. 279). . . . " *No other prohibition by the national law of a party may be neglected, not even the politically inspired impediments* which the Western tradition is accustomed to disregard." (Incidentally, we think Wolff's note that Nazi racial theories might amount to religious prohibitions (p. 174 (2)) is ingenious but does not help.) The fact is that those who find the source of law solely in a State and regard the conflict of laws as legitimately being a vehicle for mere political policy, are likely to do a disservice to human rights. England is not a party to the Hague Convention cited, consequently by applying her own standard of common law values she has again showed a more liberal attitude in disregarding penalizing restrictions than have the signatories of that " liberal " convention, a convention which, as Wolff says, has proved disappointing.

Indeed, there is nowadays a revival of the conception of domicil, so ably expounded by the great German Savigny and so strictly adopted by the English courts. Rabel himself (p. 159) points out the superiority of domicil as a test of personal law, rather than nationality, in face of some probable 30 millions of stateless persons (to say nothing of persons of multiple nationality); but we cannot accept his criticism, at any rate as regards English law, that the domicil is " of an uncertain nature," nor that " in Europe it could seem quite feasible to require that any voluntary change of domicil be reported to a public authority empowered to investigate," whilst in the U.S.A., " such intrusive

[5] Oaths Act, 1909.

bureaucratism (*sic*) is probably out of the question." The right to a change of domicil is (with the right to choose the proper law of the contract) a sound example of freedom of choice within the law and against ever-pressing claims of States. We do not appreciate the suggestion that it be limited anywhere. Nor do we accept Rabel's suggestion (p. 160) and Wolff's (p. 123) "that a period of factual residence" might be added to the ordinary requisites for domicile; this, we think, would lead to as many hard cases as the present rules and to the further police or State regulation of individual liberty. The English rules as regards domicil may be strict, but that is their main value: they are clear and well established. Rabel (p. 355) and Wolff (p. 366) refer to the question of "mutability" in connection with possible changes of "matrimonial régime" after marriage. Schmitthoff (p. 250), Rabel (p. 355) and Wolff (p. 367) say that English courts accept "full mutability" of the régime, subject to acquired rights, e.g., under settlements, though they are not happy about all the results of this doctrine.

Cheshire (p. 493–4), following in *Re Groos* [1915] 1 Ch., 572, says: "If . . . a testator of a British domicil makes a will which, in disregard of his wife's legal rights, leaves the whole of his property to a stranger, and later acquires a domicil in England, where he dies, the disposition takes effect to the full extent. . . . In the reverse case of a change of domicil from England to Holland the disposable property is diminished." Wolff disagrees (p. 368), saying: "The wife's . . . right to a moiety of the common funds, is unaffected by the change." Rabel (p. 360) observes: "Various writers have suggested that, in the event of a change of personal law, the parties should be allowed to adapt their property relations to their new legal surroundings, irrespective of the municipal law of the first State and the general conflicts rule of the second State." Such conflicting views of the conflict of laws, we submit, show the value of treating foreign law as a question of fact; it is just not safe to say, as does Rabel, that some States adopt the principle of mutability, some of mutability of new acquisitions and some of immutability.

We accept the criticism by Schmitthoff (p. 238) and Wolff (p. 596) of Cheshire's restrictive interpretation of s. 3 of Lord Kingsdown's Act. We think the wide interpretation which would apply its benefits to aliens is the right one, in view of the express references to British subjects in ss. 1 and 2.

We have never seen any value in complicating questions of succession by long discussions about which States are likely to accept various forms of *renvoi* —*Weitwerweisung* or *Rüchverweisung* (Wolff, p. 186). These again are matters of foreign law. As Rabel pertinently says (p. 75): "A striking, though tacit, answer has been provided by the English practice, more than a hundred years in development, in the very field where *renvoi* originated, viz., where nationality and domicil principles conflict . . . English judges . . . realized that the traditional form of their domiciliary principle refers to the same law which is applied by the court of the domicil." This is a practical rule when it is realized that an English personal representative has normally the option of dividing up the estate in England himself, or of handing the assets left after administration to the administrator of the domicil (see Wolff, p. 615). Such administrator is hardly likely to refuse to distribute those assets.

We have never been satisfied that *Princess Olga Paley's* Case [1929] 1 K.B. 718 will not one day be overruled by the House of Lords, to enable our courts to investigate the character of the title (if any) acquired as a result of a foreign confiscation; and we do not therefore accept Wolff's statement (p. 535) that a confiscation decree . . . "has to be respected everywhere." (And see Schmitthoff, p. 189.) The Possession of Sovereign is one thing, his title another, as the history of the cargoes of Mexican expropriated petrol showed; some of the courts of Europe refused to recognize the titles of purchasers to goods expropriated without payment. In this connection we might recall the Inter-allied

Declaration against acts of dispossession committed under enemy occupation or control of January 5, 1943 (Cmd. 6418), which as a counter to acts of spoliation and confiscation by Germans reserves to the Allies the right to declare invalid even " transactions apparently legal in form . . . "

We think Rabel is right when he says (pp. 106, 107): " It is universally agreed that foreign laws affecting a person's status are to be disregarded where they have a political or penal character. . . . Likewise, a law or decree disenabling a person from disposing of his property, in a manner discriminating against him rather than for the purpose of his protection, is generally denied effect outside of the State of enactment. Thus the Soviet Russian monopoly of trade prohibiting all private persons residing in Russia from concluding contracts with foreign countries except through the Commissariat of Commerce, like other monopolies of public law, is inapplicable outside of Russia."

We agree, too, with Wolff (p. 483) that when the law of currency restriction is neither the proper law of the contract nor the *lex loci solutionis,* it will be disregarded. We agree also the American courts were right (p. 448) in refusing to permit German steamship companies to " compensate " Jews (whose passages to the U.S.A. had to be cancelled by the outbreak of War) by paying money into a " blocked " account in Germany which would have put the money out of reach of the claimants. But we think Wolff's quite correct stand here is not consistent with his acceptance of title gained by foreign confiscatory laws.

But enough of this " common law " reaction to these contributions to learning. Lest we might give an unfair impression, let us say now that the works display a breadth of accurate learning which is in itself a liberal education to an Englishman.

Rabel and Wolff, the authors of the larger works, display an erudition which is as thorough as it is extensive. If their books are not the most suitable for the English student, they are books which every English judge and practitioner in matters of conflict of laws should have; and if their encyclopedic statements of foreign laws are not to be substitutes for personal proof of points of foreign law by experts at the time of litigation, they will at least give an English reader a clear indication of the likely attitude of the foreign expert if and when called. The indices are excellent, careful and comprehensive.

No law books, still less books like those of Rabel and Wolff, can be absolutely complete when they take the whole world of legal literature for their province; the omissions from these two incredibly well-documented works are very few, and if we mention one or two it is in no carping spirit, but merely to make suggestions for the later editions which will be called for without any doubt. We suggest that:—

(1) The case of *In Re Vocalion* [1932] 2 Ch. 196, dealing with principal and ancillary winding up orders, might be added at p. 88 of Wolff, and at p. 336 of Schmitthoff.

(2) On the historical side we think Rabel (at p. 12) and Schmitthoff (p. 12) might have included special references to Sack's remarkable monograph, " Conflicts of Laws in the History of the English Law," in " Law a Century of Progress," vol. III (N. York Univ. Press, 1937).

(3) All three authors might have referred to C. N. S. Woolf's book in " Bartolus of Sassoferrato " (Cambridge, 1913).

(4) Curiously enough both Rabel and Wolff appear to omit the Matrimonial Causes (War Marriages) Act, 1944, mentioned by Schmitthoff (p. 314 (4)). Though it must be admitted, because of the difficulty in checking Statutory Rules and Orders, it is very difficult at a given point of time to find what modifications have been made by subordinate legislation, to the operation of this Act. (A shocking state of affairs; very soon we shall have to prove English law as a fact unless the present spate of subordinate legislation is controlled.)

(5) In connection with the case of *Le Coutourier* v. *Rey* [1910] A.C. 262, which Wolff mentions at p. 173, we think the article on the Carthusian litigation in Mélanges Pillet, Sirey, 1929 Vol. II,[6] might have been quoted to show that the wide interpretation of " penal laws " was pretty well universal in 1910.

(6) The case of *Russell* v. *Russell* [1924] A.C. 687, modifies Wolff's statement at p. 390 about a father's right to declare a child illegitimate. The recent and, we think, somewhat unsatisfactory cases in Indian marriages *Baindrail* v. *Baindrail* [1946] P. 122 (C.A.), and *Srini Vasa* v. *Srini Vasa,* ib. p. 67 have been decided since the appearance of the books under review.

To sum up: Schmitthoff has written, as Lord Macmillan indicates in his foreword, a handy work of special value for the student, in reasonable compass. Rabel and Wolff have written for the advanced worker; their points of view may be criticized, but their learning is magnificent; their books are gold mines for anyone interested in the conflict of laws or in comparative institutions, and their judgments are at once careful and bold. They will be of great assistance to the Bench and Bar in dealing with cases uncovered by precedent. Germany's loss of these scholars has, doubtless unintentionally, led to the enrichment of the learning of the exiles themselves and of our own store of accessible knowledge. Hitler has done us at least this good turn.

THE NATIONALIZING OF THE LABOUR MOVEMENT

[*Contributed by* PROFESSOR D. MITRANY.]

THE rise of labour and socialist groups to power has brought up one of the strangest paradoxes of our very confused time. During the past century socialists have been the spearhead of internationalism, theoretically and politically. Now they come to power to apply the most nationalist economic system since the mercantile era. The phenomenon is too widespread to be a local accident, as might have been assumed on the strength of the early example of the U.S.S.R. Indeed, the general trend is proved by what is happening in the less developed countries. In South-Eastern Europe, as in Central and South America, each step in the progress of a socialism more revolutionary than in Western Europe carries it further towards a closed economic system. The paradox might be explained in one of two ways. The link between socialism and nationalism may be organic, and Marxists could still claim that the ways of materialist determinism work true, as the " class war " has to fight itself out within the existing social structure of the national state. Or even they could admit that " workers of the world unite " was never more than a call, sincere but transient, in the fight not against one common enemy but against the several similar enemies in their respective countries. In that sense it would have been neither new nor international. Three generations earlier the call " Monarchs of the world unite " brought about for a while a royal trade union, though little unity to Europe. And the specific republican call about the middle of the last century for a " federation of free peoples " appears on closer scrutiny to have been in the eyes of its sponsors, with Victor Hugo at their head, little interested in an international society, but wholly concerned with the organization of their national states. They merely wanted concerted action to bolster up their individual efforts and ends.

Hence the fall from international grace of the workers' movement is more striking only because it happens when a sense of international community really is beginning to take root in the West; and especially because a stateless world society had been so urgently taught and so confidently predicted as the inevitable achievement of a socialist victory. Mr. Price's detailed and careful

[6] A Marque des Chartreux et les pretensions du liquideteur devant les tribunaux étrangers.

study of the international labour movement[1] helps to make clear why this should be so. The beginnings of the international movement sprang from a common doctrine, Marxian Socialism, and its leaders, most of them intellectuals, set out to inculcate an ideology, an outlook. Their early unity, like their early divisions, sprang from theoretical issues; while their one common practical interest was to gain political power, which of necessity had to be done nationally. It was only later, round the end of the nineteenth century, that the workers of the various countries began to get together in specific fields and to set up international secretariats; and an international federation of trade unions did not come into being until 1913, half a century after the first political international. After the first World War the international unity of labour was broken and hampered by the emergence of Communist competition; later the two wings of the movement, political and trade union, were thrown together both nationally and internationally, but the movement as a whole was overtaken by the harrowing practical problems thrown up by great depression. By that time the labour groups had capable leaders and practical programmes; and in the meantime the I.L.O. had also given them a formal part in world organization and in the consideration of problems and policies. But in spite of theory and sentiment, the labour movement was as little prepared as governments and other groups to deal with those problems internationally. While rejecting Communist doctrine, labour groups had taken up eagerly the practice of planning which had come out of Soviet Russia; and by the time they were called upon to assume the responsibility of power, with the popular clamour for reform speeded up by the second World War, they found themselves, perhaps not unwillingly, with no other ready instrument in their hands than that of the national state. It was a case not only of socialism in our time but also of socialism in our country. The first experiment in Marxism, which as a doctrine had confidently proclaimed that the state would disappear through proletarian revolution, seems to be achieving instead one of the closest national economies known to modern history. The tendency in the Western countries, in spite of their tradition and need of international trade, is certainly in the same direction. That is not because the need for international economic intercourse is less, but because the wish for a controlled economy is dominant. Whether the theory of the socialist movement will adapt itself to the new state of things remains to be seen, but if it does not there is every sign that it will become increasingly divorced from practice. Socialism is beginning to find internationalism an embarrassment.

It is significant that while the trade unions have set up a new international federation, no attempt has been made to revive the socialist international; the claim of the W.F.T.U. to have a formal place in U.N.O. was supported by the Soviets, but opposed by the Western Labour governments and groups. They cannot welcome a possible duplication of policy, or the pressure of foot-loose workers' internationals. In fact, their very success is facing labour groups in the West with a double dilemma. The Soviets have solved one point of it by making the trade unions part of the political machine; at present this is criticized in the West, where the workers are obtaining and acquiring a share in industrial management. Yet the trend seems inevitable; either the trade unions will be integrated into the particular system, or the labour world may move on separate and possibly antagonistic lines in the fulfillment of a planned economy. The tripartite constitution of the I.L.O., into which the Soviet system does not fit, brings out the difficulties of a planned economy with an autonomous trade union organization. In the second place, the labour groups have not yet faced the other dilemma of their victory, that they are no longer allied defenders in a common struggle against the capitalist state, but potential competitors as masters

[1] *The International Labour Movement*, by John Price (Oxford University Press, 1945. 15s.).

of their several planned states. The class struggle is fading out, the national struggle remains. It is yet to be seen how ideological internationalism will survive the tide of social nationalism. And the whole meaning and purpose of the great experiment of the I.L.O.—on whose constitution and future position two able reports[2] are now available—is also put into question by this transformation of labour from social supplicants with common needs and aspirations, into political rulers with separate powers and ambitions.

NOTES ON IMPERIAL CONSTITUTIONAL LAW

CANADA

[*Contributed by* Professor John Willis.]

The notes published in last year's *Journal*[1] covered the period 1943 to the middle of 1945, and these notes are therefore confined to developments in Canadian constitutional law during the latter part of 1945. There are only two matters that call for any comment.

1. The Law to be Applied to the Settlement of Disputes between Provinces or between a Province and the Dominion.—*In re* Taxation Agreement between Government of Saskatchewan and Government of Canada[2] is a decision of an arbitral tribunal and not of a court, but it raises a problem of first-rate importance—by what law should disputes between the semi-sovereign entities of the Canadian federation be decided? The problem is practically important because it is becoming quite usual for a province to enter into an agreement with another province, e.g., for the elimination of double taxation of estates of deceased persons, or with the Dominion, e.g., for the sharing between the Dominion and each province of the cost of the provincially created and provincially administered old age pension schemes, and disputes must inevitably arise in the course of their operation which the parties will wish to be settled not on the basis of what is just and equitable but of strict legal right. These disputes may be decided either by an *ad hoc* arbitral tribunal or, if the parties to it have passed legislation agreeing that the Exchequer Court of Canada (the federal court of first instance) shall have jurisdiction in case of controversies between them[3], by the Exchequer Court, but, whatever the tribunal, the question at once arises—what law is the tribunal to apply? This question then divides into two further questions. First, what principles of interpretation should the tribunal apply to the words of the agreement in dispute? Should it approach them as if it were construing a contract between two hard bargaining business men and refuse to imply any term unless "it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would have replied, 'Of course, so and so would happen; we did not trouble to say that; it is too clear.' Unless the court comes to some such conclusion as that it ought not to imply a term which the parties have not expressed."[4] Or should it recognize that the business rule of interpretation is based on the idea that courts have no responsibility for and no interest in the smooth working of business men's agree-

[2] *International Labour Conference*, 27th Session, 1945, Report IV: Matters Arising out of the Work of the Constitutional Committee—Part I. The Relationship of the ILO to Other International Bodies (ILO, Montreal, 1945).

Report of the Conference Delegation on Constitutional Questions on the Work of its First Session, January 21-February 15, 1946 (International Labour Office, Montreal, 1946).

[1] 27 *Jour. Comp. Leg.*, 92.

[2] 1946, 1 *Western Weekly Reports*, 257.

[3] Exchequer Court Act R.S.C., 1927, s. 31.

[4] Scrutton L.J. in *Reigate* v. *Union Mfg. Co.* (*Ramsbottom*) *Ltd.* [1918] K.B., 592, quoted and applied by the majority in *In Re* Taxation Agreement, 1946, 1 W.W.R. at 273.

ments—business men can, and must in any case learn to, look out for themselves—and has no application in the field of government where courts have always recognized some responsibility for seeing that the machinery works? If so, the tribunal will feel free to read into the agreement any term that it thinks would be reasonable under the circumstances; it will, that is, play the statesman and not the mere lawyer. Second, how should the two semi-sovereign states which have contracted as equals and are now facing each other as plaintiff and defendant in a lawsuit be treated? Should they be treated as separate persons devoid of the special prerogative immunities which would have been theirs had they been facing a subject instead of one another? Separate persons they cannot be, for the common law which grew up under a unitary system of government recognizes "no legal personality in our provinces or in our dominion; they are simply geographical and administrative areas,"[5] but should they be treated for the purpose of pleading their prerogatives against one another as if they were? This is a question on which there is no authority and which in the rarefied atmosphere of one "aspect" of a single "Crown" suing another "aspect" of the same "Crown" is exceedingly difficult to answer.

Both of these questions were involved *In re* Taxation Agreement. In 1942 the Taxation Agreement in dispute was made between the Dominion Government and the Government of Saskatchewan and under it Saskatchewan gave up for the duration of the war its right to impose income and corporation taxes, and in return the Dominion promised to pay Saskatchewan in compensation an annual sum amounting to about 15 per cent. of its revenues. When the instalment payable in January, 1945, fell due the Dominion refused to pay it on the ground that the Province owed the Dominion a sum larger than the instalment under another agreement, the Seed Grain Agreement of 1938. The Province admitted that on balance it owed the Dominion more than the Dominion owed it, but denied that the Dominion had any legal right to set off the amount payable to it under the Seed Grain Agreement against the amount payable by it under the Taxation Agreement and maintained that the Dominion was therefore in default under the Taxation Agreement. In pursuance of the provisions of the Taxation Agreement the dispute was referred to an arbitral tribunal, all members of which were agreed that the decision must be rendered upon principles of law.

The first main contention of the Province was that there must be read into the Taxation Agreement a clause saying that the Dominion should not have the right to set off against the payments due thereunder any sums due to it under other agreements. The majority members rejected this contention by applying the business man rule of interpretation referred to above: "applying this principle it seems impossible to say that, had the circumstances as they subsequently developed in this dispute been brought to the minds of the parties when the taxation agreement was being made, the parties would both have said there would be no claim to set-off . . . because . . . the matter was too clear for argument."[6] The dissenting member accepted it, and said that "in searching for rules of law . . . we must look primarily to the field of public and administrative law, not private law, since we are not dealing with a contract between private persons but with an agreement between two governments, acting through the Crown and validated by Acts of Parliament";[7] "Counsel for the Dominion, basing himself solely on private law cases, argued that we should not imply a term in the taxation agreement against set-off; in my view such a term must be implied in every Crown agreement, unless the contrary is expressed, because of the well-known immunity of the Crown";[8] "At the time the taxation agreement

[5] F. R. Scott, Note 10, *Can. Bar Rev.*, 664-665 (1932).
[6] 1946, 1 W.W.R., at 273-274.
[7] 1946, 1 W.W.R., at 285.
[8] 1946, 1 W.W.R., at 287.

was negotiated it is common knowledge that, not only Saskatchewan, but other Provinces as well, were in debt to the Dominion. . . . If set-off is due on a seed grain debt it is due on all other debts, thus striking at the very stability and security which it was one of the purposes of the agreement to establish."[9] The contrast between the " business man " and the " governmental " principles of interpretation is here clearly marked.

The second main contention of the Province was that even assuming that the procedural provisions of the Exchequer Court Act were to be applied to the proceedings before the arbitral tribunal and that a very general section in this Act gave a right of set-off to individuals suing in that court (matters it is not proposed to discuss here), the rule that there can be no set-off against the Crown debarred the Crown in the right of Canada from claiming set-off against the Crown in the right of Saskatchewan. Counsel for the Dominion boldly argued that the Crown in the right of the Dominion was incapable of contracting with the Crown in the right of the Province, that it was for this reason the taxation agreement had been made between the fictional entities of the Government of Canada and the Government of Saskatchewan and that when these fictional entities come into court the rules which apply to them are the rules relating to private individuals. This contention was rejected by the whole tribunal on the ground that " in numerous cases it is recognized that the Crown in one aspect may have dealings with and under proper circumstances may sue the Crown in another aspect."[10] It then became necessary to answer the question whether when one aspect of the Crown is suing another aspect of the Crown each may claim against the other its Crown immunities, in this case the right to be immune from set-off. The majority members remarked that " the assertion of a prerogative or immunity of the Crown in the circumstances here seems particularly out of place," for " by the word prerogative we usually understand . . . that special pre-eminence which the King hath over and above all other persons " and " the parties here have contracted on a basis of equality and considerations which might be applicable between His Majesty and the subject seem inappropriate,"[11] and decided that " in testing the rights and remedies of the parties here arising out of their contractual relationship it would be appropriate . . . to apply to them the rights and remedies available to individuals in similar contractual relationships under the remedial practice and procedure provided by . . . the Exchequer Court Act."[12] This is an eminently sensible solution but less easy to support on legal principle than the position of the dissenting member, for it seems to run counter to a decision of the Privy Council and also to the well-established rule that no court can execute a judgment against a government. In *in re* Silver Bros., Ltd.,[13] " two governments, that of the Dominion and of Quebec, were competing against a bankrupt estate for funds due on taxes. The Dominion tax statute gave the Dominion a priority, but as there was no reference to the Crown in the statute the Province was held not to be bound on the well-known principle that the rights of the Crown cannot be diminished by statute without special reference. Clearly in this case the Crown in right of Quebec availed itself of a Crown privilege as against the Crown in right of the Dominion. That is the very point at issue before our tribunal."[14] Furthermore the right of set-off is tantamount to compulsory payment. and the tribunal by recognizing that right in the Dominion has in effect seized the property of the Province in order to enforce the right of the Dominion.

In the result the tribunal held by a majority that the Dominion was entitled to set-off against the Province and was therefore not in default under the

[9] 1946, 1 W.W.R., at 288.
[10] 1946, 1 W.W.R., at 276.
[11] 1946, 1 W.W.R., at 281.
[12] 1946, 1 W.W.R., at 282-283.
[13] [1932] A.C. 514.
[14] 1936, 1 W.W.R., at 295.

Taxation Agreement. The decision itself, however, is less important for what it actually decides than for the sharp relief into which it brings the difficulty of deciding disputes between the semi-sovereign states of the Canadian federation in accordance with a law which denies their very existence and treats their agreements as if they were bargains between pork packers for the purchase of pigs.

2. Taxing Powers of the Provinces ; inability of a Province to Change the Situs of Property by Legislation.—Reference was made last year to the rule in that in exercising its power to pass legislation levying " direct taxation within the Province " under s. 92 (2) of the B.N.A. Act a Province cannot by its own legislation enlarge the ambit of this taxing power by giving to intangible property a situs which it does not possess by the rules of the common law, and to the application of that rule to the case of shares in a company.[15] A decision of the Manitoba Court of Appeal has recently considered the limits of that rule as applied to money payable under a life insurance policy.[16]

Most insurance policies issued by Canadian companies are not under the seal of the issuing company and contain a term providing that on the death of the insured the insurance moneys shall be paid at the head office of the company; so that in accordance with the common law rules of situs the asset constituted by the obligation to pay these moneys is a simple contract debt and situate in the Province where the parties have agreed that payment shall be made, i.e., the Province of the head office of the issuing company. The financial centre of Canada is Ontario and Quebec and the head office will almost certainly be in one of those Provinces, with the result that any, say, Nova Scotian who takes out an insurance policy with a Canadian company and pays the premiums with money earned in Nova Scotia creates an asset which is Quebec or Ontario property and taxable by those Provinces as property passing on his death within their borders, and not Nova Scotia property so as to be taxable by Nova Scotia as property passing on his death within its borders. Until recently Ontario and Quebec did in fact remorselessly levy succession duties in these circumstances, and Nova Scotia also levied succession duty, not on the asset itself (for it was not within Nova Scotia so as to be within the Province's taxing power), but on the beneficiary of the policy if he was resident or domiciled within Nova Scotia (for he, being within Nova Scotia, could be taxed personally as a recipient of property). The result was (*a*) from the point of view of persons dying with insurance, double taxation; (*b*) from the point of view of Governments other than Ontario or Quebec an inability to tax the insurance left by one of their deceased domiciliaries unless the beneficiary of the policy happened to be resident or domiciled in the Province. The first of these unfortunate results, double taxation, has now been removed by legislative action in the Provinces of the head office; Ontario and Quebec now exempt insurance moneys payable under policies held by persons domiciled outside their borders.[17] The second still stands; unless the insurance obligation can by some means or other be brought within the province of the domicile of the person who took it out and paid for it. the Province can tax it if the beneficiary is resident or domiciled within the Province, but cannot tax it if the beneficiary is not so resident or domiciled. In common sense the Province should be able to tax it under all circumstances, for the insurance moneys now paid out were built up by money sent by the deceased from the Province to the insurance company in the form of premiums and would have been bank deposits in the Province on the death had they not been subtracted therefrom during the lifetime. In the light of the rule that a Province cannot legislate on situs is there anything that the province of the domicil of the insured can do to bring the insurance asset within its borders

[15] 27 *Jour. Comp. Leg.*, 93.
[16] *Re* Lawton, 1945, 4 D.L.R. 8.
[17] Acts of Quebec, 1943, c. 18, s. 4; Ontario, Succession Duty Act, 1939, s. 3 (*h*), and Succession Duty Act Amendment Act, 1946, s. 2.

so as to render it taxable under all circumstances and thus bring the law into line with common sense ?

Re Lawton was concerned with the validity of a section which appears in the insurance legislation of all the Provinces and seems designed to give a situs within the Province to any insurance policy issued to a resident of the Province. This section provides in effect that a life insurance contract is deemed to be made in the Province where at the time of the making thereof the insured is resident in the Province and requires that life insurance moneys payable under such a contract shall be paid in the Province in which the insured is domiciled at the date of his death. The idea behind the section seems to be to take advantage of the rule that a simple contract debt is situate where the parties have agreed that the money is to be paid, and to replace the consensual term of the contract requiring payment at the head office by a statutory term requiring payment to be made in the Province of the domicil; the rule as to situs, that an insurance policy not under seal is situate where the money is to be paid, is scrupulously observed by the Legislature in obedience to the rule that it cannot legislate to fix the situs of an asset, but the forbidden goal is reached by the road of disregarding the place of payment agreed to by the parties and, in pursuance of the power to legislate on insurance, fixing the place of payment within the Province; the policy, being now by virture of the insurance legislation payable within the Province, is now by virtue of the common law rules as to situs situate within the Province.

The court in the Lawton case was satisfied that the section was *intra vires,* and that the policy which on its face was to be paid at the head office of the insurance company in Quebec and apparently therefore situate in Quebec was by virture of the provincial legislation payable in Manitoba and so situate in Manitoba; " while it is not disputed that a Province cannot legislate to fix the situs of any asset, the Insurance Act of the Province of Manitoba is not a taxing Act but one dealing entirely with the question of insurance " said McPherson C.P.M.[18]; Dennistoun J.A. was more cautious and remarked: " According to the cases, a Province has no right to arbitrarily fix the situs of property for succession duty purposes. If this could not be done in and by the Succession Duty Act, it could not be done indirectly—through the Manitoba Insurance Act. These provisions in the Manitoba Insurance Act were not intended to fix the situs of a debt for succession duty purposes, but were only inserted as a matter of convenience to policy holders and beneficiaries and to assist them in enforcing claims against the insurance company without having to go outside the Province ";[19] but query whether Dennistoun J.A.'s charitable interpretation of the purpose of these sections is the correct one.

SOUTH AFRICA

[*Contributed by* W. POLLAK, ESQ.]

Provincial Councils and the Oath of Allegiance.—A member of the Nationalist Party having been returned at a by-election as a member of the Provincial Council of the Transvaal refused to take the oath or make an affirmation of allegiance and was prevented by the Chairman, in pursuance of Standing Rules 1 and 11 of the Council, from taking his seat. Thereupon the member applied to court for an order declaring that Rules 1 and 11 were *ultra vires* and that he was entitled to take his seat without taking the oath or making an affirmation of allegiance. The Court granted the order. *Du Plessis* v. *De La Rey N.O.* [1944] T.P.D. 226. S. 70(2) of the South Africa Act, 1909, provides that any person qualified to vote for the election of members of the Provincial Council

[18] 1945, 4 D.L.R., at p. 18.
[19] 1945, 4 D.L.R., at p. 20.

shall be qualified to be a member of such Council. S. 75 provides that a Provincial Council may make rules for the conduct of its proceedings. It was held that Rules 1 and 11 by requiring the taking of the oath or the making of an affirmation of allegiance in effect introduced an additional qualification before a member was entitled to take his seat, that a Provincial Council had no power to impose any condition precedent to the taking of his seat by a person qualified under s. 70(2), and that Rules 1 and 11 were not rules for the conduct of the proceedings of the Council. S. 51 of the South Africa Act, as amended by s. 7 of the Status of the Union Act, 1934, requires every senator and member of the House of Assembly before taking his seat to take the oath or make an affirmation of allegiance. The court regarded it as significant that the South Africa Act refrained from imposing this requirement upon members of a Provincial Council. *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271 was not cited. In view of *Barton* v. *Taylor* (1886) 11 App. Cas. 197 (which was quoted by the court) and of the earlier cases therein referred to it is clear that the principle recognized and applied in *Bradlaugh* v. *Gossett* has no application to the Provincial Council of the Transvaal.

Revocation of Naturalization Certificate.—S. 7 (*e*) of the British Nationality in the Union and Naturalization and Status of Aliens Act, 1926, as amended by s. 3 of Act 35 of 1942, provides that a certificate of naturalization may be revoked by the Minister if the person to whom it was granted "serves or promotes, or has . . . conducted himself in such manner that it may reasonably be concluded that he is prepared to serve or promote, to the detriment of the Union, the interests of a foreign State at war with His Majesty, of which he was a subject immediately before the certificate was granted." A German national obtained a certificate of naturalization in 1930. In 1941 he was detained under the National Emergency Regulations as a person "whose detention is in the opinion of (the Minister) desirable in the interest of the State, or in that person's own interest." In 1944 the Minister revoked his certificate of naturalization under s. 7 (*e*). On application the court set aside the Minister's order of revocation and declared that the petitioner retained the status of a British subject. *Kellermann* v. *Minister of the Interior* [1945] T.P.D. 179. The Minister's affidavit stated that the petitioner had conducted himself in such manner that it was reasonably concluded by him that the petitioner was prepared to serve or promote the interests of Germany to the detriment of the Union, but gave no particulars of this conduct. It was held that the existence of conduct capable of giving rise to the conclusion must be proved as an objective fact and that it was not sufficient that the Minister was satisfied of the existence of such conduct. *Liversidge* v. *Anderson* [1942] A.C. 206 was distinguished on the ground that the language of s. 7 (*e*) was incapable of the construction there adopted.

NOTES

Consolidation of Local Acts.[1]—The Middlesex County Council Act, 1944, replaced in one orderly document some sixteen statutes enacted during the past half-century. It has now been edited, with an explanatory introduction, judicious notes on the sections, useful tables for comparing the old and new provisions and an excellent index, by Sir Harry Pritchard, its skilful and experienced draftsman. In a brief preface Sir John Maude, himself eminent in the consolidation of the general law of local government and public health, justly observes that the book will be valued not only by members and officers of the various local authorities in the county but also by students of local government in general.

Middlesex contains some two dozen boroughs and urban districts. The 1944 Act covers many of the powers of these bodies as well as those of the county

[1] Middlesex County Council Act, 1944, Annotated. Edited by Sir Harry G. Pritchard (Solicitors Law Stationery Society, London, 1945). Pp. lv, 408.

council. There were, moreover, at least three special drafting problems: the Thames bridges, with which Surrey is jointly concerned; the Great West Road, constructed under former Middlesex Acts but now vested as a trunk road in the Ministry of Transport; and a vast sewerage system of which the western scheme was completed in 1936 while the eastern is scarcely yet begun. The consolidation of the law is, as usual, accompanied by amendment; there are a few novelties, which are already on the way to become precedents. One obstacle to the consolidating of local Acts—namely, the awkwardness of reproducing some out-of-date clause which Parliament would not nowadays allow—was absent because the county council was born no earlier than 1889. A statutory pedant may regret that the opportunity was not taken to expunge five obsolete Acts, dating from 1750 to 1782, for the building of former Thames bridges. Such hypercriticism, however, shall pluck no leaf from the laurels earned by Middlesex in thus improving the form of its laws during a war in which the county was often in the front line. Other local authorities governed by a tedious series of frequently amended enactments may be encouraged to follow so virtuous an example.

C. T. C.

The Institute for the Unification of Private Law.—As the readers of the *Journal* are aware, this Institute was founded at Rome, shortly after the end of the first World War, as a subsidiary organ of the League of Nations. It was endowed by the Italian government and carried on its work in close association with the Economic and Legal Sections of the League. The management of the Institute was entrusted to a board of governors appointed by the Council of the League with the Italian representative as chairman *ex officio*. When Italy withdrew from the League it was, of course, inevitable that the character of the Institute should change and a new constitution was drafted which provided for its continuance as an internationally controlled body though no longer associated with the League. In point of fact it maintained contact with the League down to the outbreak of war in 1939 and was at that date engaged in the work of collecting materials for the League Committee which had been appointed to report on the Civil Status of Women. Now that the League has ceased to exist the position is somewhat obscure, but the whole question of the future of the Institute is clearly in the melting pot. It is stated on good authority that it has survived the vicissitudes of war and that its premises and its library are intact. On the other hand the depreciation of Italian currency has created a serious financial situation which cannot be overcome without help from other than Italian sources. The Italian government is reported to be anxious to support the Institute to the best of its ability and the nucleus of a trained and experienced staff is said to be available. In these circumstances a movement has been set on foot with the aim of bringing the Institute within the scope and under the control of the United Nations Organization. It is to be hoped that this effort will meet with success. A centre or clearing house for the regulation and co-ordination of the activities of unificationists is badly needed. Experience has shown that it is undesirable to leave the difficult and often very delicate problems which are inherent in most proposals for unification entirely in the hands of private organizations which may be in rivalry with one another. Moreover, these organizations do not always possess the necessary means or facilities for adequate preliminary exploration of the ground to be covered by a unifying measure or the influence required to bring into line all the interests which may be affected by it. The Social and Economic Council of U.N.O. would seem to be the body best adapted to exercise the necessary functions of centralization and control and the Institute would be a valuable subsidiary organ for the purpose of carrying out the work of preliminary research and the formulation of proposals for unification when the demand for it is well established. There is no reason to fear that the adoption of this course would place any difficulties in the way of independent research or that it would unduly restrict the movement for unification. Its object would merely be to ensure that, if there is a demand for unified law, the matter will be dealt with seriously and adequately. A somewhat analogous case is that which has arisen in the United States where machinery of the unifying process is provided in the shape of the activities of the Commissioners on Uniform State Laws working in close contact with the American Law Institute. An interesting problem may arise

in connection with the draft international codes which have been prepared by the Institute from time to time at the instigation of the League of Nations. These relate to such topics as the sale of goods, arbitrations, the liability of innkeepers, the formation of contracts *inter absentes* and the civil liability of automobilists. Most of these draft laws met with a somewhat cool reception on publication, and it may perhaps be advisable to regard them as derelict. But they are the product of much hard work and patient research. The files of the Institute are replete with information which should be of very great value to comparative lawyers and, whatever may be the fate of the Institute, it is to be hoped that every effort will be made for the preservation of these materials. H. C. G.

Unified Law in Canada.—The Report of the 28th Annual Meeting of the Canadian Bar Association held at Montreal in August, 1945, which has just reached this country, contains much that is of interest not only to English lawyers, but also to comparative lawyers elsewhere. So far as the movement for the unification of law within the Dominion is concerned the general situation remains much the same as it was before, and only slight progress has been made. The Commissioners on Uniformity of Legislation have recommended for enactment by the Provinces draft measures dealing respectively with the Law of Evidence, Registration of Partnerships and the Law of Warehouse Receipts. The proposals for a draft uniform Act on Mechanic's Liens still remain under consideration. It may be noted that the draft Evidence Act (s. 5) does away with the effect of the ruling of the House of Lords in *Russell* v. *Russell* [1924] A.C. 687. It is pointed out in the Report of the Ontario Commissioners that this ruling has led to serious hardship in the case of soldiers' divorces, and that its result, in general, is to exclude the evidence which is most applicable and available in the circumstances. The draft Warehouse Receipts Act is inspired by the American Uniform Law on this topic and has the effect of simplifying and clarifying the turgid mass of difficult case law which is the worst feature of the law relating to documents of title to goods. Is it too much to hope that at some date in the near future a similar measure may be laid before Parliament in this country ? If this is done one of the least satisfactory features of our commercial law might disappear. The reform of the law as laid down in the Factors Act, 1889, is long overdue. One of the most interesting questions raised in the Report of the Commissioners is that of the situation created by the decision of the House of Lords in the *Fibrosa Case* [1943] A.C. 32. The Commissioners for Manitoba have drawn attention to Dean Falconbridge's article on " Frustrated Contracts: the Need for Law Reform " in the *Canadian Bar Review* for June, 1945, with a view to possible unification of the laws of the Dominion along the lines of English Law Reform (Frustrated Contracts) Act, 1943. The memorandum of the Commissioners does not contain any expression of opinion as to whether the English Statute should be adopted in its entirety or not. Dean Falconbridge, in the article referred to, appears to be somewhat critical of the Statute, more particularly in so far as the excepted cases are concerned, i.e., contracts of affreightment and insurance. He makes the observation that if the mere fact that the law is settled is to be deemed to exclude remedies for unjust enrichment then " the sooner the law is unsettled the better." It should be pointed out, however, that the exception of these matters from the operation of the Statute was not based on a mere desire to refrain from unsettling settled law. The business interests concerned were given every opportunity of pressing for a change in the existing law. They did not do so because the question is really one of the insurance of risks and they are not dissatisfied with the law as it now stands. Questions of abstract justice hardly seem to be relevant when a disturbance of the practices of commerce may be the only tangible effect of a change in the law.

H. C. G.

The Mexican Free School of Law.—In 1937 the Escuela Libre de derecho founded in Mexico in 1912 celebrated its twenty-fifth anniversary. The British Ambassador in Mexico, Mr. Charles Bateman, kindly sent the books hereinafter referred to for the Fry Library and thus enabled the writer to give his impressions of the work of that school.

Professors of the School are co-opted by the faculty (Sunta General de Professores). They are completely free in their teaching activities and their office is honorary. The school is administered by an Executive (Sunta Directiva) con-

sisting of the Rector and two elected members (Vocales). The Treasurer and the Secretary are the only other officers; it is left to the students to maintain order and discipline. Financially the School relies solely on the fees paid monthly by the students.

For many years the Federal Government of Mexico withheld the recognition of diplomas given by the Free School of Law. Recognition came first from the several States of Mexico and it was only in 1930 that the Federal Government gave to the School the status of a *persona juridica* and recognized its diplomas. A holder of such a diploma could henceforth claim admission to the Bar.

These facts come from the preface to a series of legal works published in honour of the school on its twenty-fifth anniversary.[2] That preface written by the expert hand of German Fernandez del Castillo contains a short description of the present state of juridical doctrine in Mexico. The first codification period (1870-1889), with its French and Spanish influences, was followed by the second (1929-1932) when Mexican jurists—like many of their colleagues in other Latin American countries—fell under spiritual influence of the Italian jurisprudence. The problems created by such two "Receptions" were not easy. A population of about twenty million souls, of mixed origin, not all (e.g., the two million Indians) readily speaking Spanish, as to fifty per cent. illiterate,[3] could not have been very receptive to abstract jurisprudence coming from countries of different and more homogenous civilizations. It fell to the Supreme Court of Mexico and to Mexican Professors of Law to adapt general principles to the needs of the country and gradually to shape a national system of law embodying native traditions and progressive notions of Western civilization.

For such adaptations the study of history of a country's law is clearly of great importance. It is therefore fitting that the first work published in honour of the School's anniversary is an important study on History of Law in Mexico in three volumes,[4] written by a master—Professor Obregon—whose name is a household word to students of Latin American Laws.[5] It forms a valuable contribution to the history of legal thought generally and of the evolution of Spanish medieval legal doctrine in particular. It also gives the author's views on some modern schools of jurisprudence and should prove of great assistance to a Mexican student. The author lays great stress on the need of the study of history of Mexico's native (Aztec) Law, completely rejects the view that such study is merely a theoretical speculation (*curiosidad impractica*) and gives a most instructive account of the Law of Aztecs (Tomo I Libro II). Fortunately the first Viceroy of Mexico, Antonia de Mendoza, ordered a codification of Aztec laws by Indians themselves. The Code so compiled is known as *Codice Mendocino*. It was published—together with other Indian codes—by Lord Kingsborough in his collection "Antiquities of Mexico." Lord Kingsborough's name—nearly forgotten in his own country[6]—is gratefully remembered by Mexican scholars.

There are some parts of Obregon's work which—so one ventures to think—could have been omitted, as being not relevant to the subject matter of it and not being on the level of scholarship expected from the author. But on the whole the *Apuntes* will be a necessary study for all who are interested in the evolution of law. By publishing his work in honour of the Free School Obregon paid a high tribute to it. And when one sees some of the School's work one feels that such tribute is well deserved.

The Fry Library has also received copy of twenty-five theses[7] for the degree of

[2] *Trabajos juridicos de homenaje a la Escuela Libre de Derecho en su* XXV *aniversario. Volumen Primero.* (Mexico D. F. 1937.) (Being also Tomo I of *Apuntes* referred to in Note 4.)

[3] Gunther: *Inside Latin America* at p. 58, estimates the illiteracy at sixty per cent.

[4] *Apuntes para la Historia del Derecho en Mexico* por T. Esquivel Obregon. Tomo I —Los Origines. Tomo II—Nueva Espagna. Tomo III—Nueva Espagna (Derecho Privado y Derecho de Transition). Mexico, 1937-1943. Pp. 511, 703, 768.

[5] His best known work in English is "Latin-American Commercial Law" (with the collaboration of Professor Edwin M. Borchard), 1921.

[6] Lord Kingsborough published his book in three volumes in 1830-1848. The Dictionary of National Biography records that "The book cost him £32,000 and his life. Oppressed with debt, he was arrested at the suit of a paper manufacturer and lodged in the sheriff's prison, Dublin, where he died of typhus fever." (D.N.B., v., XXXI, p. 131.)

[7] The theses were collected and sent to the Ambassador by an eminent jurist, Lic. Enrique Velasco.

Licenciado published recently by the School. Serious study under expert guidance marks them all, and they cover a wide field. They are available for consultation in the Library.

Sgr. *Leyva*[8] clearly explains the present law on the ownership of property by the Church. After the separation of the Church from the State in Mexico (1860) several legal provisions reduced the rights of the Church to a precarious user of property. In his view the adoption of a new law—on the lines suggested in the second part of his book—could meet the intentions of the Mexican legislator and at the same time give to the Church security of tenure needed for the free exercise of its spiritual activities (p. 15).

Sgr. *Rodriguez*[9] advocates changes in Mexican law to secure inamovability and complete independence of the judges.

Sgr. *Iturbe*[10] makes detailed suggestions for the reform of criminal procedure before Justices of Peace.

Sgr. *Villalobos*[11] contributes an interesting essay on " recurso " in civil procedure—steps open to set aside in many ways final or interlocutory purgements on the basic ground that in the altered judgment " The expressed will of the State does not correspond with the reality of legal relationship " (*realidad juridica,* p 11).

Sgr. *Padilla's*[12] thoughtful study deals with the limits of constitutional power which he defines as the " political will " (*voluntad politica*) of a nation (p. 49). He accepts the traditional catholic thesis " potestati legitime imperanti, obtemperandum esse " (p. 48), but thinks that constitutional power is limited l.a. by principles of natural law and religion.

Sgr. *Meouchi*[13] finds in the work of Oliveira Salazar, inspired " by the genius of the best catholic philosophers " (p. 34), the expression of the modern conception of the State (p. 65).

Sgr. *Sanchez*[14] gives the history and the present state of Mexican Labour Law on the question of wrongful dismissal of a workman. The chapters on the compulsory re-instatement of a dismissed workman are most interesting.

Sgr. *Navas*[15] compares the law of Mexico on Social Security with the plans of Beveridge and Mr. Roosevelt. He finds that each of the three countries has evolved a plan suitable to its own conditions.

Sgr. *Herran*[16] traces the history of mining laws of Mexico and describes the legal nature of concessions.

Sgr. *Urquiza*[17] presents a careful analysis of the new legislation on Guarantee companies which are formed to guarantee both to the Mexican Government and to private persons. He points out that the first of such companies was formed in London in 1720 and that under the enactment of 1942 foreign companies may carry on guarantee business in Mexico. Sgr. *Alvarez*[18] gives an interesting account of some problems facing such companies and lays stress on the primacy of law over administrative discretion.

Sgr. *Benfield*[19] deals with legal questions of land credit (*el problema hypothecario*) in Mexico and suggests changes in the present system, which he finds unsatisfactory.

Sgr. *Del Moral*[20] analyses the responsibility of the lessee in the event of fire on the leased immovable.

[8] *Los bienes immuebles de la nacion con destino religioso.* Por Rodrigo Valle Leyva.
[9] *Breves apuntes sobre la Inamoviladad Justicial.* Guillermo Acuna Rodriguez.
[10] Guillermo Perez Iturbe: *Breves Observaciones sobre el procedimiente penal en la Justicia de Paz.*
[11] Oscar Guiterrez Villalobos: *Los Recursos en procidimiento Civil.*
[12] Juan Ignacio Padilla: *Limites al Poder Constitujente del Estado.*
[13] Edmundo Meouchi: *La Organizacion Juridico—Economica de Portugal a la Luz del Pensamianto de Salazar.*
[14] Alvarez Sanchez: *El despido injustificado del trabajador en el derecho mexicano.*
[15] Abraham J. Navas: *El Seguro Social. La Ley Mexicana frente a los planes* Beveridge *y* Roosvelt.
[16] Jose Herran: *Los Yacimientos Minerales.*
[17] Ignacio Gomez Urquiza: *La Nueva Ley de instuticiones de fianzas.*
[18] Enrique Velasquez Alvarez: *Fiscalismo y. Derecho.*
[19] Jose Mancebo Benfield: *El problema hypotecario de Mexico.*
[20] Javier del Moral: *La responsibilidad del arrendatario en caso de incendio del immueble arrendado.*

Sgr. *Ostolaza*[21] describes the *contrato estimatorio* (similar to " sale on approval ") known to Mexican commercial practice but not to Mexican Statutory Law.

Obligationes naturales in Mexican Law are the subject of Sgr. *Ayala's*[22] study.

Some difficult problems of Bills of Exchange are considered by Sgr. *Macedo*.[23]

Sgr. *Guajardo's*[24] study on the right of vote of shareholders in limited liability companies is a valuable contribution to the subject.

To Sgr. *Lagos y Romo*[25] matrimony is *sacramentum magnum* which should not be dissolved. In the same spirit Sgr. *de Cosio*[26] advocates punishment of adultery and Sgr. *Colina*[27] of abortion.

Sgr. *Alpuche*[28] summarizes the interesting provisions of Mexican Laws as to the inalienability of family property (" el patrimonio de la familia ").

Theory of value in the economic sense is the subject of Sgr. *Cancino's*[29] study.

Sgr. *Pineda*[30] bases his enquiry of Suicide on a lofty conception of value of human personality.

Private international law is the subject of a most interesting study by Sgr. *Liceaga*[31] and of the thesis of Sgr. *Naranjo*.[32]

It is to be hoped that the Fry Library will be receiving more books by Mexican jurists. Their work is not only necessary for their own country, but also forms a valuable contribution to general jurisprudence. To them and to the *Escuela Libre de derecho* go our best wishes for the continued success of their work.

V. IDELSON.

Legal Aid.—Mr. A. Hassard-Short, Secretary of the Law Society Poor Persons Committee, contributes the following note upon Mr. R. Egerton's book on Legal Aid (London, Kegal Paul, Trench, Trubner & Co. Pp. xvi, 160. 10/6), which has a Preface by Professor Goodhart.

" This book," he writes, " is most interesting and informative and should be read with advantage not only by the Legal Profession but also by all students of the subject. It is divided into two parts. Part I, ' Historical and Descriptive,' deals with what has taken place from the date of Magna Carta to the year 1944. Part II is devoted to ' Criticism and Proposals.' The Appendices also contain much useful information. The Proposals do not differ very much from the recommendations contained in the ' Rushcliffe ' Report. (See *Jour. Comp. Leg.*, vol. xxvii, p. 103.) More credit might have been given to those responsible for the present Poor Persons Procedure in the High Court and Court of Appeal. Appendix ' B ' is of considerable assistance to me.

" Since the publication of the book considerable strides have been made in speeding up the handling of ' Service ' divorce cases. ' Service ' divorce cases are those in which any party to the suit is a member of H.M. Forces (' The Armed Forces of the Crown ') and is not above the rank of Petty Officer, Royal Navy; or Sergeant in the Royal Marines, The Army or the Royal Air Force.

" The Service Divorce Department of the Law Society consisting of six Units in London has been expanded to 18 London Units and 18 Units at various branch offices in the Provinces.

" Each Unit consists of a conducting Solicitor, three managing Clerks, and appropriate typing and clerical staff.

" On March 26, 1946, the Lord Chancellor announced in the House of Lords that the necessary support as regards finance, premises, equipment and staff would be given.

[21] J. Lupez Ostolaza: *Brevas Notas Sobre el contrato estimatorso.*

[22] Manuel Castelazo Ayala: *Las obligaciones naturales en el dorecho mexicano.*

[23] Manuel Sierra Macedo: *La lettra de cambio acceptada sin contener la firma del givardor.*

[24] Ignacio Guarjardo: *El derecho de voto en la sociedad anonima.*

[25] Jose L. Lagos y Romo: *El matrimonio come institution juridica, social y religiosa.*

[26] Llata J. de Cosio: *Monografia sobre el delito de adulterio.*

[27] Ricardo M. Colina: *El aborto, no es un delito ?*

[28] Rafael G. Alpuche: *El patrimonio de la familia.*

[29] Fco M. Culvas Cancino: *Essays sobre el valor.*

[30] Angel M. Pineda: *El suicidio, posicion cientifico valorativa.*

[31] Octaviano Liceaga: *La teoria de la incorporacion en los conflictos de leyes.*

[32] Nemesio S. Naranjo Jr: *Concepto de derecho internacional privado y la validez de los matrimonios extranjeros.*

" The London Poor Persons Committee is now granting over 1,000 Certificates per week.

" The ' Target ' now aimed at is that these matrimonial causes shall be handled at the rate of 20,000 per annum and it is anticipated that all arrears will be wiped out in the course of the next two years.

" On January 1, 1946, there were 15,629 applications awaiting consideration in the office of the London Committee. During the first six months of the year, 7,999 fresh applications were received, making a total of 23,628 applications.

" Since January 1, 1946, the London Committee have granted 9,803 certificates.

" Applications are still coming in at the rate of about 50 a day. Up to December 31, 1945, 12,953 cases had been assigned for conduct to the Law Society Service Divorce Department.

" On July 4, 1946, a new Rule was passed (S.R. & O. 1946, No. 1033/L.12) providing for payment of a small fee to Counsel briefed by a conducting Solicitor in a cause in which the conducting Solicitor is employed by the Law Society and is conducting the cause on behalf of a member of the Armed Forces of the Crown. This is the first time any provision has been made for Counsel fees in Poor Persons Cases. The fee is £1 3s. 6d. for each undefended cause, or £3 5s. 6d. for each defended cause."

Trust Systems in the American Republics.—In the issue of the *Tulane Law Review* for March, 1945, there were two articles which precisely illustrate the advantage secured by comparison of law. That the Trust is unknown to the Civil Law is in the main true, though, as Me. Lepaulle pointed out in our own columns, the Civil Law does provide means by which the principal results of the Trust system are attainable.[33] The practical usefulness of the Trust in many directions, has, however, secured its introduction in many Civil Law jurisdictions in America and the methods by which this has been accomplished, as also the scope given to the Trust, are dealt with in these articles. Sig. Villella writes on " The Problems of Trust Legislation in Civil Law Jurisdiction " with special reference to the Law of Trusts in Puerto Rico.[34] Mr. Patton writes more generally on " Trust Systems in the Western Hemisphere.[35]

We learn that according to Professor Wisdom[36] there are three methods by which Civil Law countries have sought to secure the benefits of the Trust device. By the first method the common law (*sic*) trust, as it is known in Anglo-Saxon law, is adopted as definitely a foreign novelty. This method has been used in Louisiana and in effect also in Quebec. Obviously it can hardly be used save when Bench and Bar are familiar with the English language. The other two methods are not always easy to distinguish in actual wording. An expansion of some recognized Civil Law substitute for Trusts has sometimes enabled some of the benefits of the Trust device to be secured. Mr. Patton cites Scotland and Cuba as having had recourse to this method. Or the trust device may be incorporated into the statutory law under the guise of some civil law institution and in terms of concepts of the Civil law.

This latter method is the more interesting and its application in several American republics is fully discussed by Mr. Patton and by Sig. Villella. Me. Lepaulle, it appears, suggested some time since that the old Roman law *fiducia* is capable of fulfilling the same social work as the Trust.[37] No country has, however, adopted this suggestion. On the other hand, Panama and Puerto Rico have endeavoured to meet the need by an adaptation of the *fidei commissum*. The Panama Trust Statute is the result, almost exclusively, of the private efforts of Dr. Alfaro, sometime President of the Republic. The law was first enacted in 1925 and was re-enacted under a new constitutional régime in 1941. The Puerto Rico laws were first enacted in 1928 and are in principle based on the Panama precedent. An

[33] " Trusts and the Civil Law " *Jour. Comp. Leg.*, 3rd Series, XV, Part 1, pp. 18 ff. *See also* the Review by the late Sir Maurice Amos of the relevant treatise by Me. Lepaulle at pp. 137-139.

[34] *Tulane Law Review* XIX, pp. 374 ff.

[35] *Tulane Law Review* XIX, pp. 398 ff.

[36] *Tulane Law Review* XIX, pp. 351, 408.

[37] *Tulane Law Review* XIX, at p. 381, referring to an article by Me. Lepaulle in 36 *Yale L. Journal* 1126 (1927).

analysis and critical account of these enactments are to be found in Sig. Villella's article.

In Mexico also, laws based on Dr. Alfaro's work were enacted in 1926. The *fideocomiso* was treated as an " irrevocable mandate by virtue of which there is delivered to a Bank as Trustee certain property to be disposed of according to the will of the settlor for the benefit of the *cestui*."[38] But the Mexican legislature, Mr. Patton tells us, was disquieted by Me. Lepaulle's thesis as propounded in his article in our columns above mentioned. In this article it will be remembered the Trust is explained in terms of the Civil law as an affectation of (or a charge upon) property. One may doubt whether British legislators would be disturbed by a legal theory put forward by professors, more particularly by foreign professors, however distinguished. But Mexico is more teachable. At any rate, the Mexican legislation in 1932 proceeded obediently to treat the *fideocomiso* as an affectation of property and ceased to refer to mandate.

Mr. Patton's article contains also reference to the Trust legislation of other American jurisdictions and the exposition of the development and the limits of trust legislation in the various Republics given by him and by Sig. Villella is full of interest. F. M. G.

The Microfilm for Lawyers.—While many libraries in Great Britain have suffered considerable damage, great efforts have been made to provide for the needs of those which have suffered even more severely on the Continent. In medicine the supply has been organized under the auspices of the Royal Society of Medicine, and the microfilm has been brought into use especially for periodicals. But there does not seem to be any similar movement in respect to law and the pioneer work done by this Society some years ago in arranging for a microfilm of the first two scarce volumes of its publication still stands alone. Nevertheless the microfilm has been making progress and many to whom its use was repugnant have been moved by the persuasive advocacy of Mr. Fremont Rider, who is well known in library circles in this country and the United States, where he is librarian of the Wesleyan University. His contention that it is possible to reproduce a volume of 250 pages on the back of a single catalogue card is somewhat startling, but it is being put into operation. The whole story is told in his book " The Scholar and the Future of the Research Library," published by the Hadham Press in New York. The great problem among lawyers in the United States is in the accumulation of law reports, which is experienced on a smaller scale in this country, the Dominions and India. But whether it is possible to adapt oneself to the use of micro-cards for the kind of reference normally required in looking up cases is very doubtful. It is quite different from microfilms of long runs of periodicals such as *The Times,* which may soon find their way into the Inns of Court and other law libraries as they are doing into the British Museum. C. E. A. B.

Bathing Huts at Alexandria.—A recent number of the *Gazette des Tribunaux Mixtes*[39] contains the judgment in a group of cases before the Egyptian Mixed and National (Native) Courts relating to the control which the municipality of Alexandria exercises over the bathing facilities on the beach. It is by no means the first time that this matter has been before the courts. In 1933, to go no further back, the Mixed Court of Appeal[40] was seised of a complaint by the holder of a *Ruksa* (permit) for a bathing hut who had been required by the Municipal authorities to transfer his occupation to another site. It was admitted that the *Ruksa* was granted against payment of fixed dues and the Court laid down that a contract of hire was thereby created which was governed by the relevant rules of the Civil law. In granting the *Ruksa* the Municipality *" n'accomplit pas des actes qui rentre dans les cadres de ses pouvoirs publics; elle agit comme agirait un simple particulier."* It is true that Regulations reserved to the Municipality a right to transfer a holder to another site *" pour des motifs dont elle reste seule juge souverain,"* but this right, said the Court, must not be exercised *" arbitrairement*

[38] The Mexican laws appear to be limited to Banks as trustees. Indeed, in the Americas the " private " trustee though not unknown has not the prominence that he has long had in British practice.

[39] *Gaz. Trib. Mixt.* XXXV, No. 411.

[40] *Gaz. Trib. Mixt.* XXIV, p. 30.

par favoritism ou suivant sa fantasie." Good reason must be proved to the Court and in the absence of this proof the Municipality was condemned to pay £E60 damages.

In view of this decision of the Court of Appeal it may seem somewhat surprising that the Municipal authorities should have provoked by their action the group of cases more recently reported. It seems that in the spring and summer of 1944 the authorities were desirous of making changes in the allocation of sites of bathing huts and of exercising a more effective supervision over their occupation. The usual currency of a *Ruksa* was from May 1 to April 30 in the following year. Many holders had enjoyed the same allocation for some years past, renewing the permit, or more correctly obtaining a new permit as a matter of routine after payment of the fees. It was indeed explicitly stated in the receipts given for these fees that such payment with a view to obtaining a *Ruksa* was not to be deemed to imply acceptance by the Municipality of an offer to take a *Ruksa*. But this clause was interpreted by the court as merely added by way of precaution since there were far more people seeking *Ruksas* than the accommodation allowed. It did not authorize the Municipality to eject a previous holder if, at least, the refusal to renew had not been formally communicated to the applicant before the commencement of the new season (May 1). In each of the cases under reference the facts differed. In each, however, the plaintiff had for some years previously enjoyed a particular site and the Municipality sought to eject him though it had failed officially to notify him of its intention before the commencement of the new season. The various courts in general adopted the thesis that there had been a tacit re-letting in accordance with the articles of the Civil Code relating to hire. Some of the conditions governing the grant of permits laid down in the Regulations seem hardly consistent with this interpretation of the relation between the parties, but the courts succeeded in evading this issue.

In one case, however, which came before the Mixed Civil Court of Alexandria[41] a somewhat different line was taken. The case was a strong one. The plaintiff had actually received his *Ruksa* for a specified hut for the year May, 1944-April, 1945. The *Ruksa* had, however, been withdrawn in June, 1944, and the plaintiff ejected as a result, it seems, of a decision of the recently established *Comité des Plages*. The discretionary powers of this Comité were declared to be absolute by the Arrêté which established it. Nevertheless the Court deemed itself entitled to examine and pronounce upon the reasons for which the discretion has been unfavourably exercised to the detriment of the plaintiff. It put aside the question as to whether there existed a civil contract of hire between the parties and treated the plaintiff's claim as relating to an administrative measure alleged to be in violation of the law. Claims of this kind are or may be held to be within the terms of Art. 43 of the Règlement d'Organization (1937) under which the Mixed Courts exercise their jurisdiction, and the Court laid down: "*attendu qu'une mesure administrative est prise en violation des lois et règlements lors qu'elle est contraire non seulement au texte mais aussi à l'esprit de ces lois et règlements ou lors qu'elle ne remplit pas les conditions de forme par eux exigées ou quand elle se heurte au but que ces lois et règlements sont destinés à assurer.*" This is a broad statement and might carry a court very far. The conclusion in the particular case was that the Municipality was mulcted in £E75 by way of damages and further required to repay £E25 of the £E30 fee paid by the plaintiff for the disputed permit. The whole series of cases must have been the cause of considerable expense to the Municipality and one wonders what provocation in fact existed to lead to such drastic proceedings.

The English Reports do not suggest the occurrence of similar disputes at English seaside resorts. Regulation of stands for bathing machines is provided by s. 69 of the Towns Police Clauses Act, 1847, and s. 171 of the Public Health Act, 1875, but the only case which I find reported is in 1898 in which a regulation which gave to the U.D.C. unlimited power to revoke a licence was held unreasonable.[42] Bathing machines, however, are movable objects used only on the foreshore; the regulation of permanent bathing huts is another matter. As to the foreshore, one

[41] *Gaz. Trib. Mixt.* XXXV, No. 25; Baudrot and Municipality, Nov. 18, 1944. Cf. XXXIV, No. 53, and for further decisions by the National (Native) Courts, XXXIV, pp. 47-49.

[42] *Pelham* v. *Littlehampton U.D.C.*, 63 J.P. 88

recalls the unhappy decision in *Blundell* v. *Catterall*[43] which laid down that His Majesty's subjects had no right at Common Law to walk thereon or bathe therefrom. The Common Law in 1821 breathed, however, a different atmosphere to that which affects it to-day. And though the rule established in *Blundell* v. *Catterall* is now, it appears, too venerable to suffer violence,[44] yet in fact the Crown, at least, normally uses its beneficial interest in the foreshore only to secure the orderly user by the public. F. M. G.

A Library of Foreign Law.—A statement of the work done at the Library of the Peace Palace during the war by Dr. Jacob ter Meulen shows that it has been possible to compile a catalogue of all the books dealing with foreign law from the year 1800. Owing to the wider scope of the work undertaken by the Library, this includes not only the foreign law in the Palace of Peace but also all the books dealing with the subject to be found in the various Dutch libraries. This step has been taken to meet the practical difficulty arising from the impoverishment of the libraries in the country and the necessity for the co-ordination of the institutions and the centralization of data. The basic principle is set forth by the Librarian as " with the comparatively small territory of the Netherlands the library work should be seen as a whole. Division of labour and co-operation are more necessary than ever before. We now have an apparatus which gives a good survey of what is to be found anywhere in the whole of the Netherlands in the field of the national law of the various countries."

" The catalogue is divided into two main parts: one part in alphabetical order of the authors' names (or other arranging-names), and another part in alphabetical order of the countries, which is further systematically subdivided into a few sections. It is this latter part especially that was prepared during the war." There are two other union catalogues in the Netherlands. In the Royal Library, The Hague, there is an alphabetical union catalogue of all the large and many smaller Dutch libraries. The Technical College, Delft, has a similar catalogue in the field of technics and science. It is interesting to recall that the only other similar undertaking of this scope and size is the South African Legal Bibliography compiled by Mr. A. A. Roberts (see *Jour. Comp. Leg.*, Vol. 25, p. 83). In fact, the South African catalogue to a considerable extent is complementary to the law library in the Palace of Peace and it is a singularly happy coincidence that Mr. Roberts's monumental work is concerned with the basic law of the Netherlands.

Bankruptcy Treaties. — Dr. Nadelmann has reprinted from the *University of Pennsylvania Law Review* a useful article which makes a comprehensive survey of the bankruptcy treaties from the earliest times in European countries and also covers Latin America. As regards the British Commonwealth he points out that " while agreements to avoid concurrent bankruptcies now have become a common feature between civil law countries, the same is not true of common law countries. No agreement on bankruptcy exists between the nations forming the British Commonwealth, nor between these nations and the United States. Nor has the basis for bankruptcy agreements so far been found between common law and civil law countries. Great Britain has concluded with other European countries numerous treaties on judicial assistance and the recognition and enforcement of money judgments, but as yet no treaty on bankruptcy." The position in the United States is also examined.

In reaching a conclusion he has experienced the common difficulty of finding a method of reconciling the differences between the two great legal systems and pleads for the study of each by the lawyers in the other group. " Comparative study in bankruptcy law," he observes, " in addition to being good mental practice, will serve an actual interest. International commerce is the immediate beneficiary and should, therefore, liberally support such work." Lawyers by their study and research can assist the commercial community to find a practical solution of the problems which arise in conducting international business.

[43] (1821) 5 B. & Ald. 268.

[44] In 1899 Cozens-Hardy J. (as he then was) clearly viewed with moral disapproval the action of the Llandudno U.D.C. in seeking to restrain preaching on the sands (2 Ch. 705). And five years later the same judge seems to have concurred in confirming the right of a grantee of the foreshore to forbid bathing therefrom rather as bowing to a long established decision than as approving it. (*Brinckman* v. *Matley* [1904] 2 Ch. 313.)

Roman and Comparative Law. — The number of the *Tulane Law Review* for June, 1945, contained a spirited article by Mr. Gordon Ireland of the Catholic University of America addressed primarily to American lawyers and pleading for a more sympathetic and less impractical attitude towards the legal systems of the Central and South American Republics. For British readers the interest of the article will be found principally in Mr. Ireland's criticism of the term " Comparative Law " and his attack upon the common opinion that Roman law is the chief basis of continental law. " As to comparative law," he says, " there is really no such thing. The term is a symbol only. What we really mean by comparative law is comparison of laws." And the limits of profitable comparison are narrow. " Correct knowledge of even one legal system is beyond the capacity of the profoundest thinkers," and " complete knowledge of two systems is an attainment beyond the reach of thought." We need not dissent from Mr. Ireland's *dicta,* though somewhat violently expressed. And, as he says, the value of comparison is dominantly practical. Undoubtedly we in England have, more particularly in recent years, profited much by the study and comparison of the systems of law on the Continent and legal developments in the Dominions. We appear to-day to be handling the common law with a somewhat more fearless hand and are permitted to avow that the good lady has her frailties. Indeed, to tell the truth, the great bulk of the law from day to day administered by our judiciary has about as little to do with " Common Law " as a basis as Continental law according to Mr. Ireland's view has to do with Roman law. Terminology and a few more or less respected institutions complete the bulk of the debt in each case.

F. M. G.

The Law of Colombia. — Note was made in the *Journal* (Vol. 27, p. 100) of the volume published by the Library of Congress containing a Guide to the Law and Legal Literature of Colombia. It was written by Mr. Richard C. Backus and Mr. Fanor J. Eder. Owing to the death of the former a manuscript left by him containing a supplement to the Guide has been edited by Mr. Eder and published in the *Tulane Law Review* (Vol. 20, pp. 392-410). It records extensive amendments to the constitution which were made by an Act passed in 1945. They include changes in the election to membership in the Council of State and the duties of that body. There is also a substantial revision in Title XV relating to the Judiciary and the administration of law. Provisions are directed to the strengthening of the Judiciary and to raising the status of the legal profession by requiring that only those who have earned their doctorate may be enrolled as Attorneys of Law. This revision of the Constitution has led to the publication of a new edition of Professor Tascon's commentaries on it.

For the student of comparative law it is interesting to note that the Bench and Bar of Colombia rely so much on French law as to have made desirable a translation into Spanish of Professor Josserand's work on the Evolution of Liability and the work of Mazeaud on Civil Liability for Torts.

This supplement has been conveniently arranged under the same headings as the original work so that the article in the *Tulane Law Review* may be easily annexed to it.

Marriage Bar in the Civil Service.—The National Whitley Council of the Civil Service was asked by the former Chancellor of the Exchequer, Sir John Anderson, " to examine the working of the marriage bar in the Civil Service, and the arguments for and against its retention; and to consider and report upon the implications of a removal of the bar." Their report is available in a Parliamentary Paper (Cmd. 6886. H.M. Stationery Office, Price 4d.) and in it they have confined themselves " to an objective review of the existing rules, of their working, and of the implication of change, with certain recommendations on subsidiary points, in the hope that such a review may assist the Government in reaching a decision which must " as they realize " be influenced also by wider economic and social considerations outside the scope of the National Whitley Council." Accordingly they make no recommendations either for or against the removal of the marriage bar.

The report is of interest in these pages as the Committee collected information not only about the practice of certain other employers in this country but also of some foreign and Dominion countries. In the United States, U.S.S.R., Sweden, Denmark and Finland married women were employed in permanent posts before

the war and that policy is being maintained. The variations consist in the arrangement made for maternity leave. In the United States it is treated as ordinary sick leave or annual leave. The U.S.S.R. gives 35 days before confinement and 42 days after; the rate of pay varies according to length of service and trade union status, but the minimum is full pay for 47 days and half pay for 30 days. In Sweden four months' leave is given on sick pay rates. Denmark gives six weeks on half pay though more may be granted on a medical certificate, and further leave can be given without pay up to nine months in all. Finland gives two months on full pay.

Gratuities on marriage are not given either by the United States, U.S.S.R., or Finland, but in Sweden on reaching pension age a married woman who has left the Civil Service on marriage gets a deferred pension based on the length of her former service. Denmark gives one-eighth of the salary for each year's service with maximum of one year's salary.

In response to a request for opinions and comments the United States are emphatically in favour of the employment of married women, on the grounds of equal opportunity and of efficiency of the public service. The U.S.S.R. did not express any opinion. Sweden stated that the employment of married women has been allowed " on the grounds of equal rights, but has found that they have some disadvantages as employees." Denmark observed that it had been necessary to provide for light duty for married women in some cases and Finland found that no general disadvantage had been experienced.

Canada, Australia, New Zealand and South Africa had only employed married women exceptionally in permanent posts before the war. Although they employed them during the war all are agreed in returning to the pre-war policy with the exception of New Zealand, who at the date of the report had not reached a decision on the point.

There were some variations in the arrangements made for maternity leave and also for marriage gratuities. Australia did not give any reason for returning to the pre-war policy, while Canada observed that many women employed during the war were found to have a disadvantage as employees and South Africa considered the maintenance of the marriage bar to be in the widest public interest.

NOTICES OF BOOKS

UNIFICATION OF LAW

The Directors of the Graduate Institute of International Studies at Geneva were certainly well-advised in deciding to give to a wider public the benefit of enjoying these lectures[1] originally delivered to the more limited audience of the Institute's members. Dr. Schnitzer by his treatises on international and comparative law has established his standing as a writer of authority in his chosen field of study and in the five chapters of this volume he has within the modest compass of a hundred pages provided a complete and adequate survey of the whole problem of the unification of law among the nations in its juridical and sociological aspects. The lucidity and precision of his exposition, for which the French language is so admirable a vehicle, afford to the reader an intellectual pleasure not commonly experienced in the perusal of a legal disquisition.

The subject is a topical one. The world is torn apart by the contentions on the one hand of those who seek to promote international unity and on the other hand of those who are concerned only to secure their individual national interests. Recent conferences have shown how serious a barrier to mutual understanding is the absence of a common language. The legend of the Tower of Babel tells how the heaven-ward aspirations of the peoples of the earth, then all of one speech, were defeated by the Almighty confounding their language so that they might not understand one another. In a scarcely less degree the diversity of laws among the nations has stood in the way of their co-operation for common ends. " It impedes commerce and communications, creates misunderstandings of all sorts and is out of harmony with the economic and spiritual interdependence of the modern world."

Dr. Schnitzer discusses the prospects of achieving a unified world-system of law

[1] *De la Diversité et de l'Unification du Droit.* By Dr. Adolf F. Schnitzer. (Bale: Verlag für Recht und Gessellschaft A.G., 1946.) Pp. 111.

with chastened optimism. He deprecates the narrow and provincial patriotism which exhibits itself in an unwillingness to learn from others; at the same time he recognizes that diversities arising from different social and economic conditions and from varying degrees of development are not only justifiable but have a value in the enrichment of culture. After a general examination of the nature of the problem, the practical methods and technique of the process of unification, for example, by conventions, treaties, parallel legislation and so on, are discussed in one chapter; in another, the possibility of further developments is canvassed, as affected by the different considerations applicable to the various departments of law, commercial, domestic, and real property. The fourth chapter deals with what has so far been accomplished and the volume concludes with a general outlook on the future. The discussion of principles is given actuality by the citation of practical examples of unification drawn from a wide range of reading. It is pleasant to find in an appended bibliographical summary references to articles which have appeared in this *Journal* and to Professor Gutteridge's studies on the subject.

It would be attractive to dwell at length on the many interesting topics which Dr. Schnitzer propounds but to do so would necessarily involve for the most part a recapitulation of what has been better said by the author himself. He is informative and suggestive rather than controversial. The reviewer best discharges his task by advising students of the subject to enjoy for themselves the pleasure and the profit which they cannot fail to derive from a treatise of such graceful erudition.

MACMILLAN.

RECENT TRENDS IN ENGLISH PRECEDENT[2]

THIS small book is an offprint of one of the chapters in the learned author's forthcoming work on "The Province and Function of Law." It is a scientific analysis of the relation of two main ideas in the technique of judicial precedents—the application and development of the law by (1) logical deduction from principles already embodied in earlier decisions or in legislation; and (2) endeavour to keep the law in harmony with the changing needs of the community governed by the law. The examination of the topic is very thorough and is based on a close study of the authorities. The investigation of it in English law is preceded by Chapter I on "Fallacies of the Logical Form in Interpretation of the French Civil Code" and Chapter II on "Fallacies of the Logical Form in the Uncodified Modern Roman Law." Both of these are useful for comparative purposes. As to English law, Professor Stone rightly assesses logic as of secondary importance, although it certainly cannot be ignored as a factor influencing the courts in their decisions; for occasionally a case comes before them in which, however desirable it may be in the interests of common justice to hold that a particular rule should be laid down to meet the facts of the case, the adoption of such a rule would be in flat contradiction of an earlier decision which is binding on the court. The history of our common law, as well as its administration at the present day, show that a certain amount of conflict between the two principles stated above, and also some inconsistency in the application of logic itself, are inevitable. Professor Stone has set out under detailed headings, and with abundant illustrations from the law reports, the various forms that these conflicts and inconsistencies have taken; it is, of course important to realize that they do not constitute any substantial derogation of what Professor Stone felicitously describes as "the magnificent achievement of the English courts in evolving great bodies of rules reasonably adapted to changing conditions." The theory of precedent has, as is well known, been the subject of a good deal of academic literature, and there are copious references in this book to the views of other writers. In connection with "duty" in the law of negligence, we venture to call the author's attention to the article in 34 *Columbia Law Review* (1934) 41-66.

At p. 34, the reference to consideration in contract as "approaching its demise" is misleading, for no legislative action has been taken on the recommendations of the Law Revision Committee. At pp. 42-43, the view that the

[2] *Recent Trends in English Precedent*. By Julius Stone, LL.M., S.J.D., D.C.L., Challis Professor of Jurisprudence and International Law, University of Sydney, 1945. (Sydney Associated General Publications Pty., Ltd.) 76 pp.

" ideals of logical consistency of legal propositions as a basis of decision " are " spurious " is too sweeping. Such consistency should not, and in fact does not, dominate judges, but it is a factor that, quite properly, they do not brush aside, because, if they did, it would tend to make the law more uncertain than it is. We can dismiss as misprints " dependant " (p. 24), " proferred " (p. 36), " *petitio principis* " (p. 40); but there are also some oddities of expression for which an English reader can find no literary support; e.g., " voidity " (p. 29), " refrainer " used as equivalent to " abstention " (p. 37); " not-arbitrariness " (p. 38); " thoughtways " (p. 51); " unbalance " used as a noun (p. 52). The telescopic " insofar " (*passim*) is presumably justifiable as an Australian import of a form sanctioned by American literature. These minor criticisms in no way diminish the eagerness with which we look forward to the publication of the volume of which this offprint is a portion that demonstrates the ability and profound learning of the author.

P. H. Winfield.

THE DEVELOPMENT OF THE LEGISLATIVE COUNCIL[3]

Miss Perham, whose name is known to all who take interest in colonial affairs by reason of her authoritative knowledge of Africa, contributes an introduction to this new series which aptly starts with Mr. Wight's volume. The series has been made possible by the activities of the Colonial Research Committee of Nuffield College, aided by the Trustees of the Higher Studies Fund of the University of Oxford.

The choice of the legislative council as the central institution for study is amply justified; it is this body as the organ of representative government in the more developed colonies which looks for an increase of its powers, largely as a result of the colonial contribution to the war effort. Much indeed has been happening even since the book left the author's hands.

The wide variety of colonial constitutions is well known. Mr. Wight has set out to tell the history of the council from the time of the old representative system, of which only three examples remain. He then traces fully the change-over to Crown Colony government, the development of the legislative council with its official and unofficial nominated membership, the present structure, the place in the constitution of the Governor and the executive council, and the working of imperial control. Of particular interest is the discussion of communal representation. The feature of the new representative system in the 19th century was the changing proportion, in the councils of settled colonies, of elected and nominated, unofficial and official, members. Elected representation was based, as in the United Kingdom, on the territorial unit. But the African and Asiatic colonies contain plural societies and the basic unit of representation has to be the social and cultural community. This makes constitutional progress slower; it is not simply a question of the pressure of a single community on the government as was the case with the earlier settled colonies. Recent events in Ceylon have shown that there comes a stage in constitutional development when an attempt has to be made to sever communal representation from the political life of the State. It would be a bold man who could give an assurance that a solution is attainable, but the Donoughmore Committee tried in 1931 and the Soulbury Commission has gone forward another big step. Mr. Wight's lucid and penetrating analysis of the differences between the settled colonies and those with plural societies is among the most valuable of the features of his able study.

Many a student must have questioned the value of legislative councils in colonies which seemed remote from responsible government. How many have known that the chief function of providing for expenditure is by Ordinances discussed and passed by the legislative council—a function secured to it by Lord Grey ? It is the debate on these Ordinances which gives to the council one of the main functions of the House of Commons, the discussion of government policy on appropriation of supplies.

There are many abroad, especially among our American allies, who criticize our attitude to the colonial question. For them this book should serve to show how patient and laboured have been, and still are, the varied experiments in

[3] *The Development of the Legislative Council,* 1606-1945. By Martin Wight. Volume 1 of Studies in Colonial Legislatures; edited by Margery Perham. (London, Faber & Faber, 1945). Pp. 187. Price 10s. 6d.

constitution making. There is no standard pattern for the form of government to be imposed on British colonies. The advance goes on, halted at times, it is true, by occasional failures to achieve the purpose of the advance, but government is an art which can only be imposed by trial and error; perfection is unattainable. Nobody has as yet succeeded, as has Mr. Wight, in telling the tale from the institutional angle with so much clarity and skill. One regret only may be felt that space did not permit of a reproduction of specimen instruments of government, but H.M. Stationery Office can readily fill this gap on demand.

E. C. S. WADE

LEGAL AID CLINICS

THE report of the Rushcliffe Committee on legal aid disclosed what a great variety of devices has been adopted in this country in an attempt to provide some measure of legal assistance for the poor person. In the United States even more types of organization have grown up, and amongst them, the Legal Aid Clinic. This is the name given to the legal aid offices which are attached to a Law School and which are run partly by the students. The Clinics contribute a great deal to the solution of the problem of providing the poor with the professional assistance they need, but the present volume[4] is concerned with the Clinic's usefulness to the student rather than to the client, and is of interest from the point of view of legal education.

It is an obvious enough step to introduce students to a legal aid office in order that they may gain a little practical experience, but it is another matter for a law school to run a lawyer's office for the purpose of providing a thorough course of instruction in the art of legal practice. Such courses have been provided in the United States since 1914 and are now available in many of the leading law schools. Professor Bradway's book is a study of ten years' progress in the development of this branch of legal education at Duke University.

Legal Aid Clinic instruction is designed to bridge the gap between the teaching of the law which is provided at the ordinary law school and the acquisition of practical experience which is necessary before the lawyer can be considered a competent adviser for his clients. It is pointed out that the law school normally approaches problems from the standpoint of the judge or professor of law delivering an opinion on ascertained facts, whereas the practitioner must ask himself not only " what is the law ? " but " what is the best practical course for my client in all the circumstances? " Until he is able to arrive at sound decisions of this kind and to carry them through he has not completed his training.

Is this side of legal education adequately covered by the system of apprenticeship ? Professor Bradway does not argue his case but points out that there are several advantages in the course which he describes; the young lawyer has no guarantee that it is a good law office that he is going into; even in a good office the instruction will not be provided in a methodical and scientific manner and will not cover all the processes which the practitioner needs to learn; and it is not so easy to check the student's progress in an office as it is in a class. Some of these points are self-evident and others are borne out by comparison with the methods described in the book.

The first problems which the law faculty had to consider were whether they could provide a competent law office for the purposes of the instruction and how the course was to fit in with the rest of the legal curriculum. These are administrative problems which have apparently been successfully overcome. A sufficient number and variety of cases have been forthcoming without robbing local practitioners of remunerative work, and the interests of clients have been safeguarded by close supervision by members of the staff. The Clinic course is not by any means confined to work on actual cases in the office, but gives a larger proportion of the time to classroom work, conferences with the instructors, and practical exercises such as the writing of briefs and the preparation of cases for trial. It does not overlap with other branches of legal instruction because the emphasis is placed throughout on the approach of the practical lawyer, and any substantive or precedural law which may be learnt in the process is merely an incidental advantage.

[4] *Legal Aid Clinic Instruction at Duke University*. By John S. Bradway. (Duke University Press, 1945.) Pp. lx, 126. $1.50.

To help in mapping out the course, the staff analysed the various stages in a case as seen through the eyes of the practitioner. The Outline in which this analysis was embodied was subsequently modified, but it contains suggestions which even the well-established solicitor might find useful. The following is a short summary:—

1. Before the client comes to the office: Contacts with clients and institutions; office organization.
2. The first interview.
3. Ascertaining the facts: Sources and methods.
4. Classifying the case: Possible legal and non-legal remedies.
5. Determining the goal: Selection of remedy, whether legal or otherwise.
6. Determining the means of reaching the goal: Conciliation, arbitration, litigation or legislation.
7. Carrying out the plan of campaign: The technique of dealing with people, drafting documents, preparing a case, etc.
8. Closing the case: Reference to other agencies, completion; satisfying the client, assessing fees, statistical work.

On the basis of this analysis a one year course has been worked out which is designed to teach the most important of the processes involved.

The first task is to make the student familiar with the environment of the practising lawyer. He is shown the law office and the courthouse and is brought into contact with probation officers, police, members of other professions and, above all, clients. Another part of the first semester work is to learn methodical letter writing and briefing. It is not pretended that there can, or should be, any stereotyped formula for different types of cases, but instruction is given to produce a methodical approach to these tasks, while the student's initiative is developed by exercises in which the instructor takes the part of the client and one of the students interviews him in front of the class. Later in the week a discussion takes place when the points which have, or should have, been brought out at the interview are discussed.

The same method—instruction, then practical exercises, then discussion—is followed to illustrate the later stages in a case, and thus the whole of the Outline is covered. As litigation practice is taught in other courses the later classroom work is mainly concerned with conciliation, using the word in a wide sense. The students are taught to prepare for a conference and exercises are staged in which the students have to represent a " client " in negotiations, such as negotiations for a lease, or at a meeting to arrange a composition with creditors. Exercises are also arranged with students of other faculties so that the young lawyer may become familiar with the minds of members of other professions with whom he will have contact in later life as expert witnesses or otherwise.

In addition to moots with students as judges the principles of marshalling and presenting arguments are taught by work on actual cases submitted by local attorneys. The student and a member of the staff of the Clinic confer with the attorney and sometimes with the client and witnesses. The student then does the necessary research, writes a brief and delivers it to the attorney. Usually he attends the trial and discusses the conclusion.

The cases accepted by the Clinic for representation in court are principally criminal cases, of which 50 or 60 a year are handled. The student allotted to the case visits the defendant in prison, makes investigations, writes up the cases, researches into the law and attends the trial, where the defence is conducted by a member of the Clinic staff. A careful check has to be kept on the progress of cases to see that the clients receive as good service as is provided by the good law offices in the neighbourhood.

The examinations in this course, of which there are two during the year, take the form of interviews. The final examination is a sort of indoor treasure hunt in which the student is started off by being given a piece of paper containing a few salient facts. He then has to ask appropriate questions, in response to which he is given further information. In this way he elicits all he needs to know and proceeds to outline the steps which he would take in such a situation. The student is thus graded by the staff on the basis of the qualities which are desirable for a competent practitioner.

For a course of this kind specially qualified staff must be required. A large

amount of individual attention is given to the students, the larger part of their time being spent in conferences with their instructor. The classroom work is found to be indispensable to demonstrate the various processes in slow motion and because the cases in the Clinic do not always present the right points at the right times. In addition the staff not only have to be capable practitioners, but must show considerable originality and pioneering enthusiasm. A great deal of fresh ground has had to be broken and the novelty of some aspects of the course may perturb the reader at first. It may seem, for instance, that the analyses of mental processes on which the instruction is based are sometimes rather laboured and theoretical and that the thoroughness of method which the students are taught to adopt might lead to a pedantic approach which would sometimes be a stumbling block rather than a help in a busy practice. But these are minor questions. What is important is the challenge that this system of tuition presents to the apprenticeship system.

One cannot read the book without seeing that the Clinic course teaches many things that would never be learnt in a lawyer's office, and teaches other matters more thoroughly and expeditiously. On the other hand there are some things which can only be learnt by practice and experience, and it is extremely doubtful whether a Clinic course could adequately take the place of apprenticeship. As a supplement to articles of clerkship, however, some tuition of this kind deserves serious consideration. It is not essential, though it may be better, that the course should be run in conjunction with a legal aid clinic; it could be worked in during the first or second year of articles served in a private solicitor's office. It would make the practical work more intelligible to the student and it would be a wonderful opportunity of widening the outlook of the profession to include a larger measure of public service. The scientific study of legal practice, as opposed to study of the law itself, would help the profession to keep up to date and to see the practice of the law in relation to other services required by the community. One interesting possibility that Professor Bradway mentions is post-graduate studies on the lines of the Clinic course. In an age when changes are so rapid and so far-reaching refresher courses are needed not only by those who have been absent on war service. Lawyers have an obligation to look forward—to see themselves, in Professor Bradway's phrase, as social engineers—and a course designed to improve their technique provides also the opportunity of viewing their position in society and their future.

Conditions of legal practice are very different in America and lend themselves more to experiment, but this is one of the schemes which, with the necessary modifications, might well raise the standards of the legal profession in this country. However high those standards may be (and undoubtedly are in many respects), few lawyers are so self-satisfied as to maintain that they could not be improved both in business efficiency and in public spiritedness. It will be interesting to see when scientific instruction in methods of practice, which is now a well established feature of American Law Schools, will receive serious consideration in England.

ROBERT EGERTON.

UNITED NATIONS GOVERNMENT[5]

THIS little book contains a number of speeches delivered before American audiences since 1943. San Francisco and Dumbarton Oaks are reviewed, as well as the fundamentals of international organization. A collection of speeches necessarily contains some repetitions, from which emerge the author's firm convictions on the ideal international judicial system. He would widen the range of courts and abolish advisory opinions from the jurisdiction of the Hague Court. From the weakness of past confederations little hope can be given, he suggests, to that form of organization as a permanent guardian of world peace. Of the three appendices the one on post-war international judicial organization is of most general interest; it was prepared in 1944 as a report of a committee of the American Bar Association and may be compared with the actual changes which have since been agreed with regard to the constitution of the Permanent Court of International Justice.

E. C. S. WADE.

[5] *United Nations Government*. By Amos J. Peaslee. (N.Y. G.P. Putnam's Sons, 1945.) Pp. 142. Price $2.00.

THE FEDERAL SYSTEM OF GOVERNMENT.

"FEDERAL GOVERNMENT"[6] is described by its learned author, with more than a little modesty, as "a short survey" of the subject. Be that as it may, it covers a wide field and is in fact a work which, with its critical analysis of what the writer regards as the true federal principle and its exhaustive examination of the practical working of that principle in the administration of those countries which have adopted it, will be of intense interest to all students of comparative politics. It is well timed, for the possible development of the federal conception is at the moment much in men's minds and not least in the minds of those, statesmen and others, on whom the burden rests of solving the more particular problem of the future constitution of India.

The essential point in the division of powers under a truly federal government is, the author maintains, that, whatever the actual method of division may be and wherever the residue of powers may lie, neither central government nor regional government should, either under the constitution itself or in practice, be in any degree subordinate to the other, each being truly independent in its own sphere. Subjecting to this test the various governments that have from time to time been regarded, somewhat loosely, as federal, he comes to the conclusion that the only truly federal governments are those of the United States, Switzerland, Australia and Canada—the last-named, though only quasi-federal under its constitution, being in actual practice essentially federal. From this he proceeds to discuss the circumstances in which it becomes appropriate for States to adopt a system of federal government, and the various factors which tend to give them not only the desire but also the capacity to adopt and work such a system. Among other factors emphasized is a similarity of social and political institutions, and it is interesting to observe that he views as particularly difficult to operate such a union of States and Provinces, with differing systems of government, as that envisaged by the Government of India Act, 1935.

Another interesting point stressed in relation to the capacity to work a federal system—with incidental reference to its possible application to India—is that, if federation is to be established, the constituent units must already have produced for themselves stable governments with experience of performing their functions and with their roots in the people, as any regional government not so established will find it difficult to survive against the strength of a central government. It is a factor, however, which must be nicely balanced, for any undue attachment of the people to their own established government will always be a possible source of weakness in a federation, more particularly so when, as may well happen, the regional boundaries coincide with those of race, language or religion.

It is obviously impossible in this short review to deal even inadequately with the many points elaborated by the writer in his most comprehensive discussion on these particular aspects of federation. There is one factor, however, on which he lays great emphasis, as ensuring the capacity of states to form a federal union and at the same time to maintain their independence therein, namely, the sufficiency of economic resources and the proper allocation of those resources. The central government must, of course, be able to finance itself, but unless the regional governments can do the same from their own independent sources, they will either be unable to perform their functions or be able to perform them only at the price of financial dependence on the centre—which means in the end subordination.

As to the future prospect of federation, it is noted that there has been a marked tendency for central governments to grow stronger, not so much by acquiring jurisdiction in fields confided to the exclusive control of the regions as by developing more intensively the area originally assigned to themselves. It has been suggested, in the light of this, that federal government must ultimately prove to be no more than a stage towards unitary government. From this view the author dissents—with a qualification. If, of the four chief forces which have contributed to the increased strength of the central governments, namely, war, economic depression, the growth of social services and the revolution in transport and industry, the first two are to continue, they will indeed prove destructive of federalism. But the increased central control resulting from the last two can be

[6] *Federal Government*. By K. C. Wheare. (Oxford University Press: Geoffrey Cumberlege, 1946.) Pp. vii, 278. 15s.

remedied by a re-allocation of financial powers, and, if this is achieved, there is no reason, in the author's view, why federation, with its high degree of flexibility, should not survive. K. K.

DISTRIBUTION OF LEGISLATIVE POWERS IN THE FUTURE INDIAN FEDERATION

FEW will be inclined to quarrel with Mr. Ramaswamy's assertion in the book[7] under notice that India, with its impressive array of human and material resources properly organized, can be one of the fairest lands of this earth. The organization of those resources in a self-governing India, however, is a serious and difficult problem, but, whatever may be the final outcome of the long series of efforts directed to that end, it appears fairly safe to assume that, given a reasonable measure of agreement, some form of constitution based upon the federal model will ultimately be evolved, under which at least the greater part of the population will be governed. It is on this assumption and in the firm belief that no form of political organization is in fact more suited to India than a federation, that Mr. Ramaswamy sets out to deal with one of the main problems that may be expected to arise in the framing of the constitution, namely, the allocation of powers between the federal centre and the constituent units. It is a short book, attractively written and easily read, but at once critical and constructive. While the learned author does not purport to examine the essential principle of Federalism with the same close analysis as that devoted to it by Mr. Wheare in the book above reviewed, it will be found that he has the same clear conception of that principle and that the conclusions he draws from the experience gained in the practical working of existing federations are very similar. Careful to avoid the suggestion that all legal problems can under any system be entirely eliminated, he seeks a method of division of powers which will satisfy his twin tests of reasonable national unity and reasonable local autonomy. Meeting with reasoned argument and apt illustration what he believes to be the mistaken impression that a central government cannot be sufficiently strong unless invested with residuary powers, he decides in favour of the allocation of a batch of specific subjects to the centre, leaving all else to the constituent units—though it will be noted, incidentally, that he is constrained to admit that the range of authority exercisable by the federal centre over the Provinces and the States may not be the same. The subjects thus allotted to the centre he would arrange in two groups, one of which would fall within that Government's exclusive jurisdiction, while the other could be dealt with concurrently by the Provincial governments. He further suggests, however—adopting a recommendation made by the Canadian Royal Commission in Dominion-Provincial relations—that a measure of flexibility might well be introduced by the insertion of a provision in the constitution enabling a Province to delegate powers over a matter within its own competence to the Centre, and *vice versa,* either permanently or for a definite period, subject to the willingness of the authority to whom the power is delegated to accept responsibility therefor.

Such in rough outline, though no doubt here inadequately expressed, are the main recommendations of the learned author, but it would give an entirely wrong impression of the comprehensiveness of his book not to add that he does not in any way confine himself to general observations and suggestions. Not only does he adduce weighty evidence in support of the above, but he proceeds thereafter, in chapters which many of his readers will regard as the most interesting and informative in the book, to enumerate and discuss the specific subjects which he suggests should be allotted to the Centre, explaining fully their relevance and material importance in the working of the federal system, and their true meaning and content in the light of the highest judicial decisions pronounced in relation thereto. K. K.

TRADING WITH THE ENEMY

THE importance of Dr. Domke's large, well planned and excellently printed book[8] will not diminish now that hostilities have ceased. And this importance is not

[7] *Distribution of Legislative Powers in the Future Indian Federation.* By M. Ramaswamy. (London: Longmans Green & Co., 1944.) Pp. xii, 78. 7s. 6d.

[8] *Trading With the Enemy in World War II.* By Martin Domke. (N.Y., Central Book Co., 1943.) Pp. xv, 640.

merely academic in character. The reviewer remembers proceedings arising out of the Enemy Property legislation of World War I[9] still being dealt with in 1929, ten years after that war, so it is reasonable to suppose that Dr. Domke's book will remain of practical value for considerable time to come.

In the first 381 pages of text there is a discussion of the position of all types of enemies, including corporations and persons formerly of enemy nationality, internees, blacklisted persons, evacuees and prisoners of war; there is, too, a thorough account of the effect of war on various forms of property, foreign exchange control, and the position of " Governments-in-exile."

Pages 383-640 comprise a well selected reproduction of numerous statutes, regulations and decided cases, from U.S., British and Dominion sources. The Bibliography (pp. 570-577) is very complete. [Dr. Lemke's recent monograph on German laws in occupied territories (Carnegie Endowment) appeared too late to be included in the work under review.] Pp. 547-554 contain a useful list of the legislation on Enemy Trading in 18 countries.

As Professor Jessup has said: " Why should we in international law still talk of the diplomatic protection of a corporation according to its nationality or even its majority stock ownerships after Berle and Means (The Modern Corporation and Private Property, 1932) and even the *Daimler Case,* have shown us the primary importance of management and control? " (cited Domke, p. 134/135).

The difficult and somewhat unsatisfying case of *Stockholms Enskilda Bank Aktiebolaget* v. *Schering, Ltd.,* is referred to (p. 161-2), under the references [1941] 1 K.B. 424, (1941) 1 A.E.R. 257, which relate to the decision of Simonds J. The reference to " the Court of Appeals " (*sic*) in the text is misleading since the decision referred to was that of Simonds J. However, that decision has been reversed by the Court of Appeal and by a majority of the House of Lords (1943) 2 A.E.R. 486 and (1946) 1 A.E.R. 36. Now, where obligations to a German company have been performed *before the outbreak of war* by a neutral, the neutral's right to hold an English and an Indian company (operating under German control before the war) liable on their guarantee of the German company continues unabrogated, though suspended during the war. Incidentally, the dissent in the Lords in the *Stockholms* case seems to have turned largely on interpretations of fact. Lord Macmillan, one of the dissenters, states (at p. 55) that " the common law does not confiscate enemy property in this country," and Lord Goddard says (at p. 57) that the fact that the Trading with the Enemy Act, 1939, " makes debts payable to custodian shows that they were not abrogated, for there is nothing in the Act to revive debts or obligations which had become abrogated by operation of law."

Moreover, as Domke points out (p. 209), the right to sue, of aliens of enemy nationality, resident in the country of the forum, is established in the U.S.A., England and Canada by judicial decisions. " Lawful residence implies protection, and a capacity to sue and be sued," per Kent C.J. in *Clarke* v. *Morey,* 10 Johns. 69 N.Y.

Non-resident alien enemies, says Domke (p. 226), " ought not to be allowed to sue, but the appropriate administrative authority ought to be free to take over their claims," and he adds (p 234), " the position of alien enemies before commercial arbitration tribunals seems to be the same as before ordinary courts."

Domke rightly points out that the confiscatory measures establishing Commissars for former Jewish enterprises in Germany were not recognized by the courts of different countries even before the outbreak of war (p. 178), and draws attention to New York measures designed to prevent assets in that State from being " looted " by Axis manipulations. The speech of the Lord Chancellor in the House of Lords in the *Uden Case* (1943) 1 A.E.R. 76, is fully discussed in the text (p. 189 onwards) and set out in full in Appendix V (p. 539): there, a Dutch company carrying on business in occupied Holland was held to be an enemy alien and therefore unable to sue. Domke observes that the *Lubrafol Case* (1943) 1 A.E.R. 269, can be distinguished from the *Uden Case* on the ground that the Belgian company had transferred its seat to Pittsburgh, Pa., on June 20, 1940, by Belgian decree and the powers of directors residing elsewhere than in the U.S.A. has been suspended.

[9] *Western Hemisphere Control Over Enemy Property.* By Martin Domke: reprint from symposium on " Enemy Property." (Duke University, 1945.) 16 pp.

The *Fibrosa Case* (1943) A.C. 32, receives due attention (p. 198) since it will be recalled it related to a contract performable by delivery in enemy occupied territory.

It will come as a surprise to many to learn that while " property administered by the (U.S.) Alien Property Custodian in the last war amounted to something over 500 million dollars, the value of the property blocked by foreign fund control to-day is estimated at much more than seven billion (U.S.) dollars " (p. 253).

The freezing, vesting and blocking orders are, as the author indicates, measures of economic warfare and will give rise to many difficult problems in the future, both on the civil and criminal side. [Domke's article on Western Hemisphere control deals with this aspect of property control.] Will the principles of *Foster* v. *Driscoll,* we wonder, be applied to contracts made to violate freezing and similar legislation of friendly countries fighting in a just cause ? In any case, it seems reasonable to insist on parties doing all they can to obtain any necessary licences to enable their contract to be lawfully carried out. See *V. W. Taylor & Co.* v. *Landaner & Co.* (1940) 4 A.E.R. 335 (cited at p. 304).

The chapter on Foreign Exchange Control is a most valuable contribution to a complex modern problem. It is heavily documented, though we think that Dr. Lemkin's book, " La réglementation des paiements internationaux," Paris, 1939, might also have been referred to. The Draconic German legislation forbidding transfer caused diplomatic action by the U.S.A. *before* she entered the war. " Measures of economic warfare as contained in the legislation of occupied or controlled countries are by no means to be recognized in the courts of this country (U.S.A.)." This seems reasonably in accordance with the normal attitude towards legislation passed by an enemy whose occupation in an illegal war of oppression can in no sense be recognized as giving rise to anything more than purely police legislation.

Domke rightly points out (p. 325) that " to trace the ' legal ' practices (e.g., of Axis authorities acting under duress) in all their complicated details, along the lines of the municipal law of the invaded countries, is one of the important tasks in any effort at a post-war settlement of legal questions of an international character." In this connection the decrees of Governments in exile, dealt with in chapter 21, p. 345 *et seq.,* become relevant as measures, not of a penal character, but as legitimate protection against aggression. It is moreover of some comfort to learn (p. 333) that the Swiss Government's regulations are not likely to allow Allied measures for freezing enemy property to be circumvented. Nevertheless, Domke (pp. 339/40) rightly indicates that the blocking of foreign assets and the devaluation of currency are likely to be fruitful sources of post-war international litigation.

The account of the protective expropriations by the Dutch, Belgian and Norwegian Governments (pp. 345-350) is most interesting. The question of their constitutionality is one of foreign law—of fact—but it cannot be settled, we submit, without regard to all other relevant facts, including the fact of aggression. The *occupation* of *Cavalla Case* (cit p. 358) shows that the principle of effectiveness may be of importance when dealing with laws of governments in exile.

The statement that " the effects even of confiscatory measures will not be questioned by foreign courts if the property is located within the expropriating country " (p. 368) would, we submit, be more accurate if the word " when " was substituted for the word " if." Title to confiscated goods has in fact been challenged in third States when the goods have been removed there.

The fiction of corporate personality has not prevented the issue by the U.S. of vesting orders aimed at enemy controlled assets (p. 371). Purely legislative considerations should not, we think, prevent the establishment of machinery to safeguard legitimate creditors, whose claims cannot, as things stand, be satisfied out of enemy assets seized (p. 380). The reviewer made a similar plea in B.Y.I.L., 1933, in his article on the Russian Bank Cases.

Dr. Domke's work, and his other contributions to that difficult field of study, international fiscal and property law, are likely to be of great service to lawyers all over the world. Who knows ? Perhaps we are on the eve of the birth of a new *jus gentium;* if so, Dr. Domke will be one of the expert *accoucheurs* of the new international order.

B. A. WORTLEY.

ROMAN AND ROMAN-DUTCH LAW

Professor Lee's book[10] is by now a classic, one of the finest products of the Oxford Law School, and in its latest edition it has gained in practical usefulness without sacrificing any of the elegance for which it has always been conspicuous. The changes visible on almost every page show that the author has not merely incorporated the effect of recent cases and statutes, but has also reconsidered his position on many topics. Thus he takes a much firmer line than previously on the question when and how Roman Law was received into Holland and on the advisability of receiving the English law of trusts into South African law. He has also greatly improved the arrangement, as for instance in *Communio Bonorum, Boedelhouderschap,* the acquisition of servitudes and the legal capacity of married women, the appendix on which has been almost completely recast. He has expanded considerably the treatment of such topics as nullity and divorce, sale and delict, all of which are of great practical importance but had been described rather sketchily in earlier editions. Those whose interest is more in the history of Roman-Dutch Law than in its most recent developments may regret that Professor Lee has had to find space for all of this by excluding most of the detail on tacit hypothecs and other outmoded institutions, but the remedy is in their own hands: they need only keep their copies of the last edition as well as this. The book is undoubtedly far less of an introduction than it used to be, but nothing essential, certainly nothing essential to the comparative lawyer, has been omitted in the transformation into a handbook which on all general principles is remarkably complete.

Professor de Zulueta's book[11] is new. It brings together for the first time all the essential Roman texts on Sale (not merely Digest 18, 1 and 19, 1, but copious extracts from these and other titles of Digest, Code, Institutes and other juristic and non-juristic texts), together with the Sale of Goods Act, the American Uniform Sales Act and Uniform Conditional Sales Law, and the relevant portions of the French Civil Code. There is virtually no commentary, but the Latin and French texts are accompanied by an excellent translation and there is an introduction remarkable not only for its conciseness, but also for the fullness with which it deals with the most important principles of Roman, French and English Law, with occasional excursions into German Law. There is no attempt to do the student's work for him; he will still have to study the original texts, but the introduction will serve as an adequate, indeed excellent, guide. On some points, such as *arra* and *periculum,* the treatment is masterly. The only criticisms which might be made are that a little more might have been said on the modern developments in the passing of property and the remedies for secret defects. Otherwise the measure given seems to be exactly right.

These two books may be aptly reviewed together as instruments of comparative legal study. Between them they provide an indispensable and adequate starting-point for the student who is primarily an English lawyer, but has a reasonable knowledge of Roman Law on the Institutes level. His first step should be to bring his Roman Law up to date, that is, to make the acquaintance of a modern system which has received Roman Law in whole or in part. I know of no work that even approaches Professor Lee's book in usefulness from this point of view. To take only one example, if a pupil seeks to know what has become of the Roman law of delict he can turn to Professor Lee's *Introduction,* which will show him a doctrine purged of all the strange Roman archaisms, but in which all the vital acquisitions of the Roman jurists are preserved. Professor Lee seems always to make the right assumptions as to the knowledge his readers ought to be expected to have already and the amount they ought to derive from his own book. Having grasped then the structure of a modern system of private law influenced, but not dominated, by English Law, the student ought to make the more detailed study of a portion of Roman Law serve his purposes as a modern comparative lawyer. Here Professor de Zulueta's book is an invaluable collection and guide. Hitherto we have compared the English and the Roman Laws of the most valuable topic,

[10] *An Introduction to Roman-Dutch Law.* By R. W. Lee, D.C.L., F.B.A. Fourth Edition. (Oxford: at the Clarendon Press. 1946.)

[11] *The Roman Law of Sale : Introduction and Select Texts.* By F. de Zulueta, D.C.L., F.B.A. (Oxford: at the Clarendon Press. 1945.)

sale, somewhat vainly, for it is anything but easy to know the background of fact against which the Roman jurists had to work. The undergraduate can now see how the Roman principles can be made to apply to the facts of a modern society not unlike that of England and what modifications have been found necessary. Sale is indeed an admirable subject of comparative study, for the problems of Roman, French and English Law, whilst not precisely the same, are sufficiently alike to make it peculiarly worth while to trace the changes in doctrine; and developments characteristic of French Law, such as " possession vaut titre," often serve to show that the excellence of a rule common to Roman and English Law is not to be assumed without further discussion.

F. H. Lawson.

EFFECT OF WAR ON CONTRACTS

The second edition of this work[12] is considerably wider in scope and very much greater in bulk than its predecessor. In his comprehensive scheme the learned author has included new sections of interest, among them the initial chapters on the duration and termination of war and the effect of emergency powers on contracts, and has also incorporated those statutes, regulations and orders which may be regarded as having a bearing on the subject.

Mr. Webber's industry has been immense. Cases of importance have been carefully sifted and a very large number of quotations therefrom are embodied in the text; and there can be few legal textbooks where there are more lavish references to the opinions of academic writers. This resort to superabundant citation inevitably means that there is a certain measure of repetition and a slight lack of compactness; it may also be said that the learned author's fondness for the caption form of heading (" The ' Implied Term ' Writ Large," " The Legislature Intervenes ") and an extreme addiction to italics seem unnecessary devices where the material and scholarship afford a sufficiently ample attraction. On the other hand, and especially where controversial topics are in question, the reader will be grateful for the convenient marshalling of such wealth of authoritative opinion, and will not fail to recognize and to respond to the enthusiasm which permeates the whole work.

Since it is impossible to do more in a short review one or two topics must be specially mentioned. It is probable that most readers will find the greatest stimulation in the several hundred pages devoted to frustration and ancillary matters. It is here that growth in the law of contract has been most marked during this century, and there must be many lawyers who find it fascinating to watch the current gradual efflorescence which in part results from judicial attention and in part from the hardening processes of war. The learned author is an admirer of Lord Wright's " somewhat heretical " views in the matter of the juristic basis of frustration and we venture to think that, as time goes on, Lord Wright's robust and anti-fictional explanation may prevail, even though the majority of members of the House of Lords, and also Sir Arnold McNair (whose opinions in *Legal Effects of War* are, needless to say, very frequently cited) remain loyal to the more traditional theory of the implied term. Mr. Webber points with evident pleasure to the " comprehensive and authoritative definition " of frustration provided by Viscount Simon, L.C., in the *Cricklewood* case, since it contains no reference to the implied term; . . . " ' the implied term ' of legal fiction—and of Viscount Simon's previous dicta—has gone." It will certainly be of great interest to learn, from some future case, whether Viscount Simon intended his definition to preclude all resort to the implied term by way of explanation of frustration.

Mr. Webber is alive to the merits of the comparative treatment of the major subjects and, in particular, the reader will appreciate his discriminating use of American and Canadian cases. The bibliography is elaborately extensive, and the whole production marked by thoroughness of an uncommon order.

R. P. F. Roberts.

[12] *The Effect of War on Contracts.* By George J. Webber, LL.D., of the Middle Temple, Barrister-at-Law. Second Edition. (London: The Solicitors Law Stationery Society, Ltd. 1946.) lxviii and 802 pp. (£3 17s. 6d. net.)

IMPOSSIBILITY OF PERFORMANCE IN CONTRACT

A BRIEF supplement has been added to the republished first edition of this book.[13] It contains the facts of and extracts from the judgments in over a dozen cases decided since 1934, and also provides a somewhat abbreviated summary of the Law Reform (Frustrated Contracts) Act, 1943. Most cases of significance have been included, but there are no references to the current and important literature of the subject. The book itself attempts a far deeper analysis, and it is to be regretted that the supplement has not been treated in the same way.

R. P. F. R.

AN INTERNATIONAL BILL OF RIGHTS[14]

AN International Bill of Rights is the first item on the agenda of the Commission on Human Rights established on February 16, 1946, by a resolution of the Economic and Social Council of the United Nations. The resolution directed the new Commission to submit proposals, recommendations and reports on such a Bill. Meanwhile, a draft has been prepared by Professor Lauterpacht (pp. 69-74). He would have his Bill form part of the constitution of international society (p. 193).

The nearest approach yet made to a written constitution of international society is the Charter of the United Nations. Professor Lauterpacht had not seen it when he completed his manuscript in the autumn of 1943. But the Proposals from Dumbarton Oaks appeared before his book went to press; and he has added a Note (on pp. 213, 214) recognizing that in these Proposals—and as we now know, in the Charter itself—no executive powers of enforcement are conferred upon the General Assembly of the United Nations which is to be responsible for protecting human rights and fundamental freedoms. Neither the General Assembly nor the Economic and Social Council working under its authority can do more than " make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all " (Art. 62(2) of the Charter). Nevertheless, Professor Lauterpacht makes his Bill of Rights include the right and duty of enforcement. The Bill ends with the provisions: " If the Council "—this would be the Economic and Security Council—" finds by a majority of three-fourths of its members that there has taken place an infraction of the International Bill of the Rights of Man such as to warrant action by the United Nations, the Council shall make a pronouncement to this effect. If the State in question persists in its refusal to remedy the situation violative of this Bill of Rights the Security Council shall, if the General Assembly so recommend, take or order such political, economic, or military action as may be deemed necessary to protect the rights of man " (p. 74). " There must reside in the political international authority," according to Professor Lauterpacht, " the ultimate and effective power to enforce the observance of the Bill of Rights " (p. 177).

The issue is therefore fairly joined between (1) accepting the Charter of the United Nations as the last word—at least, for a long time—on the constitution of international society, and (2) regarding it as the starting point of evolution towards world government in a limited field which may widen as time goes on. Professor Lauterpacht's demand for enforcement can only be met if the recent point of view prevails over the first. The Charter carries the transfer of national sovereignty to the United Nations from its Members no further than is needed to enable the Security Council to maintain international peace and security, and even this diminution of sovereignty does not affect the Big Five, each of which may veto any decision of the Security Council save only on matters of procedure. This does not satisfy Professor Lauterpacht. His Bill of Rights " amounts," he says, " to a radical innovation in international practice and to a surrender—more formidable in appearance than in substance—of the sovereign rights of the State " (p. 81). And this is as it should be because " the State itself has come to be regarded as

[13] *Impossibility of Performance in Contract.* By R. Gottschalk, Dr. Jur. Utr., LL.M., of Gray's Inn, Barrister-at-Law, Advocate. Member of the Palestine Bar. With a Supplement for the years 1938-1944. (London: Stevens & Sons, Ltd. 1945.) xvi and 141 and index 4 pp.; Supplement iv and 28 pp. (10s. net.)

[14] *An International Bill of the Rights of Man.* By H. Lauterpacht, M.A., LL.D., Whewell Professor of International Law in the University of Cambridge; of Gray's Inn, Barrister-at-Law. (Columbia University Press: Humphrey Milford. 1945.) Pp. x, 236. $3.00.

an association larger in scope and legal authority than other associations, but not entitled to claim exclusive allegiance " (p. 113).

After six months' experience of the exercise of the veto power reserved to each of the Big Five by Article 27 of the Charter, it is time to outline the limited field in which we would like to see world authority effectively exercised. It should include:—

(*a*) the prevention of resort to war;

(*b*) the maintenance of security by the peaceful settlement of international disputes on whatever lines may be *recommended*—not " decided," since the veto can prevent " decisions "—by seven Members of the Security Council, including three of the Big Five;

(*c*) the control of atomic energy;

(*d*) international communications; and, if we agree with Professor Lauterpacht,

(*e*) the enforcement of an International Bill of Rights.

Professor Lauterpacht, as we have seen, wished the world authority to enforce his Bill of Rights (p. 208) despite the fact (p. 176) that the United States Federal Government will not enforce decisions of the Supreme Court against States of the Union. But, if he were writing now in the deadly light of the atom bomb, we may presume that he would confine sanctions to measures not involving the use of armed force; so that " the supreme executive authority of the organization of State " would *not* take military action to enforce the Bill of Rights as provided in Article 20 of his Bill (p. 74).

The United Nations Commission on Human Rights has, however, reported to the second session of the Economic and Social Council that practical and effective measures must be taken to protect human rights and fundamental freedoms. In the course of its Report " The Commission recognized that when the Economic and Social Council comes to consider the question of how to implement an International Bill of Rights, ' it may find that political actions are necessary ' " (Document E/58 of May 24, 1946). For example, the United Nations or some of its Members might agree to put diplomatic and economic pressure on any State which failed to discharge its duties under the Bill of Rights; the General Assembly could then (under Article 11(3) of the Charter) call the Security Council's attention to what was happening, and the Security Council might decide what measures not involving the use of armed force were to be employed and might call upon the Members of the United Nations (under Article 41) to apply such measures.

The Commission on Human Rights has not yet drafted the Bill which it would like to see implemented by international authority. So we come back to Professor Lauterpacht's Bill. It is divided into three parts: " Part I enumerates those fundamental rights of freedom . . . which the signatories undertake to incorporate as integral parts of their law and constitution . . . and which, subject to supervision and eventual enforcement by international organs (Part III), will be normally given effect by the municipal courts of States to the exclusion of any procedure of international judicial review " (p. 92). Those rights include personal freedom; freedom of religion, speech and opinion; freedom of association and assembly; and the rights of equality before the law, to a nationality, and of emigration and expatriation. In the main, Part I makes little change in the actual practice of the more advanced States to-day. But Professor Lauterpacht observes (p. 78) that " one of the undoubtedly revolutionary innovations of the International Bill of the Rights of Man is to do away with the antiquated doctrine that the individual is the object, but not a subject, of the Law of Nations."

Part II treats of the political, cultural, economic, and social rights of freedom. It covers the right of self-government; or of semi-independent peoples to be governed in accordance with the principle of trusteeship; the rights of minorities; and social rights, including the right to work, to education, and to public assistance. Professor Lauterpacht's handling of the right to government by consent is perhaps the most controversial section of his book. He recognizes, indeed, that only in developed society does self-government mean government by persons freely chosen by and accountable to the electors (p. 135), but he fails to impress upon his readers that most peoples, and most of the United Nations, have not yet reached this stage of political development; or that there are comparatively few States whose individual citizens must be presumed to be governed against their will, and not to be free, unless the persons who exercise authority are chosen by and accountable

to the community at large. Yet Article 10 of his Bill reads: "No State shall deprive its citizens of the effective right to choose their governments and legislators on a footing of equality, in accordance with the law of the State, in free, secret, and periodic elections." Perhaps the constituent Republics of the U.S.S.R. comply with the letter of this law. But even the letter would not allow the recent "degradation" of two of the sixteen Republics to the status of Soviet provinces. And there would need to be a big change in the Soviet conception of democracy in order to satisfy the spirit of the law.

Part III is concerned with international enforcement of the Bill. Professor Lauterpacht entrusts the task of watching over its observance to a High Commission "established within the framework of the United Nations." The official Report, already quoted to the Economic and Social Council, also recognizes the need for an international agency of implementation. In Professor Lauterpacht's scheme, the agency of implementation—the High Commission—would handle the rights in Part I differently from those in Part II. As regards Part I, the High Commission would consider petitions from persons or organizations who claim that State courts have failed to comply with the Bill of Rights. As regards Part II, the (Economic and Social) Council, apprised by the High Commission or by any State, may find that the situation in some State (because of its palpably backward policy or because of an obstructive policy which hampers improvement through general and parallel international action) violates the Bill of Rights. Even in that case the Council may, and normally will, refrain from finding that the violation calls for international action. In the last resort, however, there remains "with the highest political authority of the Organization of States the legal power to give effect to the Bill of Rights by means of coercive action" (p. 209). Such measures, we repeat, should be taken under Article 41 of the Charter and should not involve the use of armed force.

Professor Lauterpacht's book is a most valuable addition to the literature of international law and of world unity in general. It is true, as he claims (p.212), that the acceptance of his Bill of Rights as part of the Constitution of the United Nations would go far towards the political integration of international society. It would foster world loyalty. It would make for the intellectual and moral solidarity of mankind. And it would be one of the factors working for the evolution of the United Nations into a World Commonwealth whose supremacy would only be exercised in the limited field in which, at any given time, it was needed for the common good of all the dwellers upon earth.

MAXWELL GARNETT.

GREEK CIVIL CODE

THESE addresses,[15] by the then Prime Minister of Greece, by the Greek Minister of Justice and by Professor Balis, who was responsible for the final text of the Greek Civil Code, were delivered in the presence of H.M. The King of the Hellenes upon the occasion of the Code's formal promulgation by the King on March 15, 1940, and were published in French in 1940 by the Hellenic Institute of International and Foreign Law for the better information of the profession. Recently received in England, these addresses carry a strange echo from that lost, and indeed fantastic, world of the spring of 1940. Yet they mark the formal conclusion of a very long historical process and as such are worthy of notice.

Even in the throes of revolution, the Greeks had been anxious to draw up a Code of Civil law to replace the chaotic confusion of the traditional Byzantine law then in force, and appointed a committee for this purpose as early as January, 1822. A Royal decree of February 23, 1835, confirmed the continuance in vigour of the Byzantine Civil law as contained in the Hexabiblos of Harmenopoulos, but only until such time as a civil code should be promulgated, an event regarded as proximate. The project of a general Greek Civil Code, however, came to nought, though Criminal and Commercial Codes were introduced, and in course of time local civil codes came into being (Ionian Civil Code of 1841, Civil Code of Samos, 1899, and the Civil Code of Crete, 1903). One draft Civil Code was produced in 1874, and another by a commission appointed in 1911, but neither was enacted.

[15] *Discours sur le Code Civil Hellénique*, par Jean Métaxas, Agis Tambacopoulos and Georges Balis. *Publication de l'Institut Hellénique de Droit International et Etranger.* (Athènes. Imprimerie Nationale 1940.) 31 pp.

The code which was promulgated in 1940, to take effect on July 1, 1941, was the result of the work of two commissions set up in 1930, the drafts of the commissions being revised, and the final text established, by Professor Balis. However, the German occupation in 1941 led to the suspension of the code in Greece proper before its coming into effect there, though it was recognized as valid by the legitimate Greek government in exile for the jurisdictions within that government's control. Upon the legitimate government's return to Greece question arose whether the code should be amended before its application in Greece proper. Amendments were proposed, and enacted in 1945; but by a recent decree the amendments have been abrogated and the code as it stood in 1940 put into force.

This Greek Civil Code, based as it is upon customary law as well as upon studies of the French, German, Swiss and Italian codes, is of considerable interest to the comparative lawyer. I have, however, the advantage of calling the reader's attention to an excellent paper read to the Faculty of Law in the University of Cambridge, at the Faculty's invitation, by Dr. Pan J. Zepos, Professor of Civil Law in the University of Salonika, and published (*supra*) in this *Journal*. The paper of Dr. Zepos, to whom I am greatly indebted, makes unnecessary here further comment on the history and content of the code. C. J. Hamson.

RADIOCOMMUNICATIONS

Mr. Tomlinson's able study[16] combines a history of the international control of radiocommunications with a clear and detailed exposition of the present rules of control embodied in international conventions. Radiocommunication is particularly instructive of problems of international control. On the one hand international control is peculiarly appropriate because wireless waves cannot be stopped short at national frontiers by national legislation; but on the other hand radiocommunication affects so many widely differing and conflicting interests that the necessary controls are difficult both to design and to apply. Mr. Tomlinson's account of the international conferences, organizations and conventions dealing with this difficult problem will therefore be read with profit not only by those who are interested particularly in radiocommunication, but also by all who are interested generally in the machinery and methods of international government. The author is never content merely to give the bare facts of the story. He approaches official pronouncements with a healthy cynicism and has researched most effectively into the real motives and aims which undertake national policies.

Quite apart from the conventions, radiocommunication is a fertile source for difficult and fascinating problems concerning elemental concepts of international law, such as the extent of rights over territorial airspace. With these Mr. Tomlinson does not attempt to deal, and the omission is deliberate. Firstly, the book is intended as a sociological rather than a legal study. Secondly, it is a fact that juridical concepts have hitherto played only a very small part in the shaping of the international control of radio. In the many disputes that have arisen, the parties have always preferred technical to judicial solutions. Even at the conferences the technicians have played the dominant role. The omission of any discussion of juridical concepts is therefore based on the realities of the situation. This is not to say, however, that this book may safely be ignored by legal theorists, for the lawyer will find food for thought, for example, in the fact that an acrimonious international dispute may sooner be solved by the invention of the directional aerial than by learned arguments about sovereignty over territorial airspace.

Mr. Tomlinson says in his Introduction that his book is intended as an addition to the literature of international government. He has certainly succeeded in his aim; the work is well conceived and well executed and is unreservedly recommended.

R. Y. J.

CONTARDO FERRINI

This volume,[17] which was to appear in 1942, is intended to commemorate the 40th anniversary of the death of a scholar distinguished not only by the amount

[16] *The International Control of Radiocommunications*. By John D. Tomlinson. (Michigan: J. W. Edwards, Ann Arbor. 1945.) Pp. 314. $2.50.

[17] *Scritti Di Diritto Romano In Onore Di Contardo Ferrini*, ed. G. G. Archi, on behalf of the University of Pavia. (Milan, 1946.) Pp. 758 + viii.

and quality of his output, but also by his piety: he was beatified by the Pope some fifteen years ago.

De Francisci gives an account of Ferrini's life (pp. 1-16). Riccobono combats the view that the great age of Roman law was in the late Republic, the classical jurists being unoriginal. In his opinion, they made real progress, of which the overcoming of narrow formalism is an example. This, he says, is not appreciated by interpolationists, who reject good classical innovations as spurious (pp. 17-80). Arangio-Ruiz defends and elaborates some of Ferrini's theories concerning the sources of Justinian's Institutes and Theophilus's paraphrase of the Institutes. He also discusses the Basilica and urges that a new edition should be taken in hand (pp. 81-118). Albertario examines points of contact between Eastern and Western post-classical law, and mentions several factors, such as Christianity and the adoption of Hellenistic doctrine by the West (pp. 119-138). Solazzi annotates Gaius II 191-289, dealing with legacies and *fideicommissa* (pp. 139-200). Biondi argues that the Roman lawyer, neither a theoretician nor a pettifogger, but one who controlled the movement of law in a way both scientific and taking account of the needs of society, was superior to the modern *Begriffsjurist;* and that much may still be learnt from him (pp. 201-250). Grosso investigates similarities between pre-classical and post-classical law, such as the blending of *ius* and *fas*—an archaic feature, coming back through Christianity—abstract systematization and openness to foreign influence (pp. 251-262). Luzzatto holds that a constitution addressed to a particular province did not apply to others; and that each province had its own collection of constitutions (pp. 263-294). Frezza uses Livy's narrative of the private war of the Fabian clan with Veii to throw light on the political structure of ancient Rome (pp. 295-306). Guarino discusses the sources of Byzantine commentators on Justinian (pp. 307-318). Maschi emphasizes the relevance of Theophilus's paraphrase of Justinian's Institutes to the reconstruction and interpretation of Gaius (pp. 319-342). Orestano shows how the Church, by careful steps, substituted its own system of marriage for the Roman. One method was to further the publicity, under the auspices of the Church, of the conclusion of marriage—which fact disproves the interpolationist doctrine that texts stressing "subjective" consent are post-classical, reflecting Christian concepts (pp. 343-382). Voci considers that the classics regarded consent as an essential element of contract; and that the notion of contract, originally confined to civil law, was extended by them to innominate contracts (pp. 383-400). Massei inquires into the attitude of imperial legislation to classical jurisprudence. The latter is rarely quoted in pre-Justinian constitutions: it did not suit the absolute monarchy. From the 2nd century, successive laws restricted the influence of the lawyers; under the Law of Citations any authority left to them rested, formally, not on their own position and persuasiveness, but on imperial sanction. Thirty-four constitutions of Justinian refer to classics, but the references are historical rather than indicative of a return to the old law. Post-Justinian legislation hardly ever quotes the classics (pp. 401-476). According to Betti, while the classics did not treat satisfaction of a condition as of retrospective effect, Justinian did where that was expedient (pp. 477-502). Brasiello deals with the influence of Christian thought on consent and writing in the post-classical law of contract, paying attention to the general problem of how such influence might come about (pp. 503-570). Paoli treats of the relation between Attic law and Greek law in general; warning the student interested in the Oriental half of the Roman empire not to equate the two (pp. 571-594). In Lauria's view, the main difference between ancient civil law and prætorian and later civil law was, not that the former was of greater validity or less equitable than the latter, but that the former was concerned with personal powers and status, the latter with economic relations. This, he claims, explains features such as the unassignability of the ancient civil rights and the introduction of the concepts of *res* and *contractus* at the later stage (pp. 595-658). Archi asks us not to minimize the contribution of imperial legislation to the post-classical law of contract. He holds that its insistence on certainty of evidence accounts for much of the new formalism (pp. 659-728). Segrè discusses the interplay between civil and prætorian law (pp. 729-736).

This is a splendid collection. There is a distinct reaction against both hypercriticism and the overrating of papyri. The ignorance of English literature on Roman law, however, is as nearly absolute as ever. And one regrets that Volterra is not among the contributors.

DAVID DAUBE.

THE STATUTE OF WESTMINSTER[18]

This pamphlet contains the text of an address by the High Commissioner of Canada in the Union of South Africa, which he delivered (in a private capacity) at a branch meeting of the Institute in 1944. Its interest lies in the close part which its author played in the deliberations which led up to the enactment of the Statute of Westminster as a delegate to the Conference of 1929 on the operation of Dominion Legislation and Merchant Shipping Legislation. In a few pages, Canadian Constitutional history, the Balfour declaration of Dominion status and the application in Canada of the imperial Merchant Shipping Acts are summarized with a skill which could only be attained by a master of his subject. A few lines are devoted to the general effect of the Statute of Westminster and its application to the Royal Prerogative. Finally by extracts from the Prime Minister of Canada's speeches delivered in the past ten years the status of Canada in the Commonwealth and internationally is explained. Dr. Burchell accepts the decision in *British Coal Corporation* v. *The King* [1935] A.C. 500 as acknowledging the full right of the Dominion Parliament to legislate with regard to the Royal Prerogative. That this is not necessarily the result of the case, he would probably have acknowledged in a fuller discussion, and it is difficult to dogmatize on this topic; much of the field of the Prerogative has never been the subject of legislation by Parliament at Westminster and from its nature is unlikely to be.

E. C. S. Wade.

THE LAWS OF MEXICO

The late Mr. John T. Vance, before his appointment as Law Librarian of Congress, had taken an interest in the Law and Legal literature of Mexico, and during his tenure of office he developed the Mexican section to an approximate completeness. The work[19] which he had in hand of compiling a Guide of its contents has been completed by Mrs. Hellen L. Clagett, who is a member of the Bar of California and has an extensive knowledge of Spanish and of the legal systems of Latin America. The result is a volume which is outstanding for the comprehensive survey of the development of law and the books relating to it in the State, in the admirable series to which it is an important addition.

Mexico can claim a system of law dating back to the 7th century which the Spaniards promulgated at the time of its conquest in the year 1522. It was not until the Declaration of Independence on September 28, 1821, that the State first began to build up its own body of legislation, which, with the Spanish laws still remaining in force, provides a considerable mass of material. In fact, the compilers of this bibliography go so far as to state that " there is probably no library, even in Mexico, which contains all of the publications which have been printed and comprise the legislation of all the different governments and forms of government that the United Mexican States have enacted." In more recent years the State has adopted codification for the principal branches of law. The bibliography contains particulars of all the various editions and the annotations upon them published either in Mexico or elsewhere.

The book provides a complete background to an appreciation of the literature of the legal system. There is, for example, a most interesting description of the writ of *amparo,* for which, it is explained, " an equivalent term is lacking in English." It is a constitutional action which partakes somewhat of the character of our legal remedies of *habeas corpus* and injunction, but is actually an action which is peculiar to Mexico. One of the more concise explanations found for it is that of the distinguished Mexican jurist and law professor, Manuel Gual Vidal, who defines it thus: " This is a constitutional suit of a summary nature, the object of which is to protect, in a special case and at the request of an injured party, private persons whose individual rights as established in the Constitution have been violated through laws or acts of the authorities, or when the laws or acts of the Federal authorities injure the sovereignty of the States."

The origin of this *amparo* action has been a matter of controversy. Some writers

[18] *The Statute of Westminster and its Effect on Canada.* By Charles J. Burchell, K.C., LL.D. (Johannesburg, The South African Institute of International Affairs. 1945.) Pp. 16. Price 1s. 6d.

[19] *A Guide to the Law and Legal Literature of Mexico.* John T. Vance and Hellen L. Clagett. (Washington: Library of Congress, 1945.) Pp. vi, 269. $2.00.

hold that it arose merely from traditional customs coming to Mexico from her mother-country, and others contending that it developed from the influence of the constitutions of France and the United States on the Spanish Constitution of 1812, which was in force in Mexico for a short time before her independence. In any case, it is based on the civil, social and political rights of the individual such as are enumerated in the American Bill of Rights, and in the Mexican Constitutions of 1857 and 1917. It has been the subject of a considerable literature of which the particulars occupy nearly ten pages of this Guide.

The publication of this Guide should assist to introduce Mexican law to students in this country and some material can be found in the British Library of Political and Economic Science. C. E. A. B.

LAW AND CUSTOM OF PARLIAMENT[20]

THE appearance of a new edition of May after 22 years would in itself be an event of significance. The 14th edition is, however, an edition more in name than in content, so considerable has been the exposition of the developing system which Sir Gilbert Campion, the learned Clerk of the House of Commons, rightly conceived to be the fulfilment of his duty to the author and the editors who have preceded him, in preference to preserving their *ipsissima verba* as far as possible. The 1,000 or so pages, which together with an essential appendix containing the Standing Orders of the Commons make up the volume, are devoted as to some three-fifths to practice and proceedings on public business (Book II); the remaining 400 pages are divided equally between the constitution, powers and privileges of Parliament (Book I) and proceedings in private business (private and local Bills) (Book III). The most experienced parliamentarian might be forgiven if he failed to review in detail Books II and III; the outside student of Parliament approaches the task with much the same feelings as an academic student of the common law might undertake a review of the *Annual Practice,* and perhaps with less qualifications. This is not to say that the reading of the first two books of this massive treatise have not prompted some general reflections on the parliamentary machine. In Book I the lawyer will find the most authoritative exposition of parliamentary privilege which has yet been written and a Cambridge lawyer in particular may be allowed to express his gratitude and admiration to Mr. L. A. Abraham who contributes these chapters. The chapter in this Book on disqualifications for membership is an admirable contribution (by another pen) to a particularly obscure and difficult topic. Another feature is the long section of Book II which contains six chapters; it is, too, an advantage to find the party system, the daily arrangement of business, the sessional programme and the lay-out of the Palace of Westminster depicted by authors so familiar with the parliamentary scene. The section on delegated legislation is surprisingly short; some may say that this serves to put the subject in its proper perspective, but lawyers at all events will regret that Sir Cecil Carr was not given more space for exercising his well-known talent for clarity of exposition and lively treatment of the dull but all-important subject of which he is the acknowledged master.

If one pauses to consider the changes in procedure of the House of Commons in particular since the Reform Act—roughly over the period during which May has been the authoritative text-book—it is apparent that with the increased responsibility of governments the initiative in proposing changes of procedure has been a matter for the government of the day, however closely the character, dignity and functions of Parliament are concerned. It cannot be said that successive administrations have shown much enthusiasm for change. Even in recent years the long deliberations in 1931 of the Select Committee presided over by Mr. Ernest Brown bore little fruit. Resistance to any scrutiny of delegated legislation was for years obstinate on the part of Ministers. Such innovations as the past 65 years have seen, as the closure, the reference of Public Bills to

[20] *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament,* by Sir Thomas Erskine May, K.C.B., D.C.L. 14th edition by Sir Gilbert Campion, K.C.B., Clerk of the House of Commons. (London: 1946. Butterworth & Co. Ltd.) Pp. lvi + 1062. 75s.

Journal of the Society of Clerks-at-the-Table in Empire Parliaments. Vol. XIII, 1944. Edited by Owen Clough, C.M.G. (London: 1945. Butterworth & Co. Ltd.) Pp. 293. 20s.

standing committees, the Speaker's, and later the Chairman of Committee's, power of selecting amendments and the development of delegated legislation are all devices for assisting the parliamentary machine to operate smoothly and with reasonable speed for the passage of legislation for which the initiative now lies exclusively with the Government. Nor is it remarkable that procedural changes should be in this direction in a century which has seen the replacement, not yet openly acknowledged by all, of the constitutional monarchy by a parliamentary bureaucracy, a process hastened by the stresses of two world wars. Officials of the House, such as those who have so ably assisted the Clerk in the preparation of this edition must be in an excellent position for viewing critically the approaches made from time to time by Whitehall to Westminster, but obviously this story cannot be for publication.

Before making some detailed comments it is relevant to say a word about standing orders in relation to the adaptation of parliamentary procedure to changing conditions. Historically procedure goes back to a time when at all events the House of Commons was in opposition to the Crown as the effective Executive. To-day it is axiomatic that it is to the Executive chosen from its own ranks that Parliament looks for the initiative in all legislative and financial business. It is only the Executive which is in a position to command the information and resources which such business demands. Thus the position of the private member has progressively declined in importance as co-operation between the party controlling the legislature and the Executive has been achieved. The 100 or so standing orders, of which by far the greater number date from after the Reform Act, have been largely the means whereby business has been expedited by reducing the still considerable opportunities for debate (p. liii of Introduction), In other words, they achieve the control over the use of parliamentary time which every modern government requires without changing the formal relations between King and Commons which date from other times. Standing orders are flexible instruments—so flexible that a government can, if need be, readily secure their suspension on given occasions. It is thus that Parliament solves the two-fold problem of parliamentary procedure which Ilbert stated many years ago as " How to find time with limited parliamentary hours for disposing of the growing mass of business which devolves on the Government and how to reconcile the legitimate demands of the Government with the legitimate rights of the minority—the dispatch of business with the duties of Parliament as the great inquest of the nation . . .". If much of the law of Parliament is contained in practice developed spontaneously in the course of the transaction of business (p. li) or in rulings from the Chair, as well as occasional statutory modifications like the recent Statutory Orders (Special Procedure) Act, 1945, it is in standing orders that one finds the story of changing procedure.

There are some who are impatient at the slowness to introduce changes in recent years despite the frequency with which Select Committees on Procedure have been set up and, usually, but not always, have fully reported. One answer to these is to be found in the fact that the Parliaments of the Dominions, despite the number of foreign languages into which May has been translated, have more closely than any legislatures of other States followed the Westminster model and adopted the procedure of the House of Commons in its entirety. It might have been expected that the legislature of the Union of South Africa would less readily have imitated the House of Commons than has been the case with the older Dominions. Yet in the Union Parliament the only important differences appear to be: (i) that Ministers have a right of audience in both Houses, and (ii) that a Bill at the committee stage can be reported back to the House which has referred it at intervals instead of waiting for the completion of that stage. Not even in the legislature of Eire are the divergences from procedure followed at Westminster fundamental. In this connection may be mentioned the *Journal of the Society of the Clerks-at-the-Table in Empire Parliaments,* of which volume 13 for 1944 is the latest available for consultation. The *Journal* is a valuable meaus of surveying comparatively the problems of legislative procedure throughout the Commonwealth, British India and the Empire. Not only does it carry overseas valuable summaries of principal events at Westminster, but it also serves to bring home the procedural problems of other Parliaments, as well as containing much of interest to the habitual users of May; the current number contains a useful account of the new constitution of Jamaica.

Though stability is the characteristic of Parliament as an institution, the present is no time to contemplate a static procedure. Indeed, the session which has seen the appearance of a new edition of May has also had experience of new devices for speeding the legislative machine and throughout the session a Select Committee on Procedure has sat and taken evidence. The fundamental question at issue to-day is how far Parliament should accept a partial abrogation of its legal and political sovereignty, as understood in the nineteenth century. The conception of the sovereign State with its tripartite classification of organs sufficed only so long as taxation, the maintenance of order, the administration of justice and the waging of an occasional war were the principal functions to be performed. We are less confident to-day that the sovereignty of Parliament, as secured by the rules expounded so ably in this treatise, suffices to meet the needs of the public in the twentieth century State. That there is less interest in, and less respect for Parliament as an institution is, regrettably, true. In attempting too much it may fail to achieve the standard of government required to maintain public order. Few will contest that a legislative organ maintaining political control of the administration is essential if we are to continue to enjoy political freedom; but when highly complex socialized services and industries are undertaken by the State, it is apparent that a different technique is required than that provided by a carefully balanced constitution if the economic and social life of the country is to progress.

Before the next edition of May appears it is almost certain that events will have shown whether the functions of Parliament have been strained to breaking point, or, as may be hoped, a compromise will have been achieved whereby as regards the newer functions of the State a new technique will have been evolved which, while not sacrificing essential safeguards, will ensure the smooth working of socialized services without sacrificing the primary function of the House of Commons—the redress of grievances. The conception of social duties, once established, need not necessarily involve Parliament in their day-to-day administration, as it is in some danger of doing at present.

To return to the text of May some points of detail may be mentioned. On p. 20 the gallant attempt to expound the intricacies of electoral registration in a single paragraph has not quite succeeded. In his account of Haxey's case the editor accepts the views of Stubbs without reference to the later researches of Tanner and of Font which show that Haxey was never in any capacity a member of Parliament. Section 2 of the Newspaper Libel and Registration Act, 1881, which is cited as present law on p. 56, was repealed and replaced by S. 4 of the Law of Libel Amendment Act, 1884. It is curious that there is no reference to *The King* v. *Graham-Campbell, ex parte Herbert,* [1935] 1 K.B. 594; at p. 65, and only an incidental footnote at p. 80 to the proceedings arising out of the detention in 1940 of a Member of Parliament under Defence Regulation 18 B, a case which led to a reference to the Committee of Privileges. In a learned treatise touches of humour are rarely possible; it is thus refreshing to read in the account of *Paty's Case,* (1704), of the escape of learned counsel by a back window in the Temple to avoid the clutches of the Sergeant-at-Arms.

The account of the three actions *sub nomine Stockdale* v. *Hansard* is a model of exposition and to lawyers may be commended in particular the section on pp. 163-175 on misconceptions as to the nature and authority of parliamentary law and privilege. In Chapter X the effect of the death of a candidate, or of his elevation by descent to the peerage occurring between nomination and polling day might usefully have been mentioned. On p. 202 one of the lesser known points of the Succession to the Crown Act, 1707, is brought to light—that the parliamentary under-secretaries of the day were not deemed to hold office from the Crown and therefore suffered no disqualification. In general this Chapter (XI) contains the best account of the history and present law governing disqualifications for membership, drawing as it does freely from the report of the Select Committee (H.C. 120) in 1941. The "Unemployment Board" should read (p. 206) the "Assistance Board." There is no reference to S. 28 (1) *a* of the Representation of the People Act, 1945, on p. 262; this provision temporarily requires at least 40 days to elapse after the Proclamation before the meeting of a new Parliament. On p. 263 the political objections to the carry-over of public Bills from one session to the next are not given; the disturbance of constitutional law referred to in

the footnote, would, it is submitted be negligible; it is rather political objections, and in particular the " rights " of the Opposition, which have hitherto caused the rejection of various proposals for a change of practice. Finally, though it is ungracious to ask for more, when so much has been provided, the next edition would benefit both from an explanation of the mystery of " the usual channels," which formula figures so regularly in the pages of Hansard, and, for the better understanding of the well-nigh insuperable difficulties which hinder the advancement of private Members' Bills, by the inclusion of some account of the important link that has been forged between the officers of the House and Whitehall by Parliamentary Counsel to the Treasury.

In conclusion it is right to recognize the debt of gratitude which is owed to Sir Gilbert Campion and to all those who have assisted him in his triumph over all the difficulties of war-time sessions and lack of facilities for authorship and for book production. The fourteenth edition of May rises from the ashes of the bombed House of Commons to enrich in full measure the literature of Parliament and to guide those destined to sit ere long on the new green benches.

E. C. S. Wade.

WAR CRIMES

From the lawyer's point of view the most interesting questions about war crimes are their definition and the nature of the jurisdiction for dealing with them. Both questions are controversial, but neither is very satisfactorily dealt with in this book.[21] Some of the elements which the author introduces into his definition, for instance, that a war crime must be committed with " the hope or reasonable expectation " that it will not be punished, are clearly not essential to the notion. There is a fairly long discussion of the relation between municipal and international law in respect of war crimes, but it is confusing to be told that international law " speaks to the individual *via* municipal law," and that at the trial the indictment should be prepared, and punishment demanded, according to municipal law, but that for the judge " international law supersedes municipal law." Some of the book's defects may be due to the facts of its being written in a language which is not the author's own, and at a time when the author was on active military service. The general reader however will find some information which may be useful, for instance, as to why " quislingism " is not a war crime, and why war crimes are not " political " offences.

J. L. Brierly.

INTERNATIONAL HEADQUARTERS[22]

Mr. C. Wilfred Jenks has made a study of the problems involved in the situation of the headquarters of future International Institutions. It is a factual survey characteristic of the publications emanating from Chatham House and presented with that balanced lucidity distinguishing the work of the Legal Adviser of the International Labour Office, though not written in his official capacity. After reviewing the suggestion that International Institutions should operate on a peripatetic basis he examines the respective merits of the thesis that the headquarters of the different international institutions, which may be created, should be widely distributed throughout the world and the alternative that there should be a common general headquarters for all or most of these institutions. The conclusion is reached that the balance of advantage is decidedly in favour of the establishment of a common general headquarters and that international institutions should be located elsewhere than at this headquarters only in cases of an altogether exceptional character. An attempt is then made to indicate the more important facts which should be taken into consideration when selecting a general headquarters for the international institutions of the future.

A summary is presented of the main functional needs which have to be met at international headquarters in order to ensure the international institutions of the future the independence necessary for the satisfactory discharge of their duties: freedom from political control or the exercise of undue influence by any one

[21] *War Crimes. An Attempt to define the Issues.* By Manfred Lachs. (London: Stevens and Sons, Ltd., 1945.) Pp. viii + 108.

[22] Jenks, C. Wilfred. *The Headquarters of International Institutions.* (London: Royal Institute of International Affairs, 1945.) Pp. 102. 6s.

State, freedom of international discussion and decision not limited by the requirements of the policy of any one State, freedom of communication with all parts of the world, and freedom from national judicial or administrative review or nullification of their official acts.

The desirability of giving international institutions and their staffs a special status is then discussed and an outline given of the minimum requirements necessary to fulfil them. An alternative is presented of a more radical method of creating a future general headquarters by the establishment of an internationalized headquarters governed by an international authority and not subject to the jurisdiction of any one State. That leads to the point where the internationalized area may be recognized as being like the State of the Vatican City, that is a State having the same status, immunities, and privileges as other members of the family of nations both under international law and under the national law of other States. Other aspects of the creation of an international headquarters conclude a valuable study of a difficult subject.

THE LIMITS OF JURISPRUDENCE DEFINED[23]

Jeremy Bentham died in 1832. A complete edition of his writings seems as far off as ever. Mr. Charles Warren Everett, who already has the credit of having identified the *Comment on the Commentaries* among the mass of MSS bequeathed to University College by John Bowring, now gives us another discovery.

In the last pages of his classic *Introduction to the Principles of Morals and Legislation* Bentham declared that the study of the limits of penal law and of jurisprudence would be an indispensable sequel. This continuation he wrote in 1782 but never published. The Introduction had failed to attract proper attention; the sequel, as its author knew, would be found to be even tougher stuff. Bentham's truths, in his own phrase, " grow among thorns and are not to be plucked, like daisies, by infants as they run." A few years ago, when resuming his research at University College, Mr. Everett had the thrill of recognizing the missing work, *The Limits of Jurisprudence Defined.* He has patiently disentangled the material, divined its intended arrangement in spite of gaps and repetitions, and prefaced it with an editorial introduction. If war-time printers have been imperfect—there seems something wrong, for example, with *barbara celerent* (p. 26), *meri motu* (p. 93), *emptu-vendites* (p. 106), and *dicsodotic* (p. 169)—the editor and the Columbia University Press now reveal to us an important work which Dumont apparently never saw.

It is the genuine Bentham. There is the inevitable tilt at judge-made law, the " customary law " which ought forthwith to be translated into ascertainable legislation. There is the usual inventiveness of vocabulary. We know we owe him such now familiar words as " international," " codify " and " minimise "; shall we as readily adopt from *The Limits* such adjectives as accensitive, jurisdative, potisdative, catapaustic, metaphylactic or phthano-paranomic? There are characteristically practical comments on the form of contemporary statutes—their verbosity and the absence of subdivisions and of short titles. Withal there is an air of modernity. Students of the extent and control of delegated legislation will appreciate his distinction between the laws which belong to the legislator in the way of conception and those which belong to him in the way of pre-adoption. " The former are the work of the legislator solely, the latter that of the legislator and the subordinate power-holder conjunctively, the legislator sketching out a sort of imperfect mandate which he leaves it to the subordinate power-holder to fill up." All his examples of this latter type Bentham labels as by-laws (town-laws), whether they are the work of municipal bodies or of the judges making rules of court on their own authority or of the Virginia Company legislating under its charter or of the King establishing articles of war for the army under the prerogative.

The Limits of Jurisprudence Defined analyses the source of a law, the ends which a law may have in view, its subjects and objects, the parties affected, its duration and local extent, its force and the signs by which it stands expressed. In the final chapter Bentham justifies himself by claiming seven uses for his book. Amongst other things it will furnish a plan for a complete digest of the customary law (which

[23] *The Limit of Jurisprudence Defined.* By Jeremy Bentham. (Columbia University Press: Geoffrey Cumberlege, 1945.) Pp. xv, 358. 30s.

will be converted into real law), and it will encourage the improvement of the art of legislation. He has a vision of a school to teach this art "for the benefit of empires." A model of a complete code would be framed and students of various nations might meet under one roof and take in hand the jurisprudence of their respective states. As geography is taught by dissected maps, so might the legislative art be taught by taking shapeless laws to pieces and putting them together again after the pattern of the model. And in this context Bentham mentions another notable aim:—

> "To exhibit a common standard by which the several systems of law prevailing in every country may respectively be compared and thereby their mutual agreements and disagreements represented, their comparative excellences and defects exhibited to view: to the end that what is excellent in one system may be transferred, that improvements in the most important art of all, the art of legislation, may like other arts make the tour of the globe and that each legislator may add to his own wisdom the wisdom of his neighbours and contemporaries."

It is the aim of our Society of Comparative Legislation.

C. T. C.

The following publications have also been received[24]:—

Aiyar, K. V. Krishnaswamy. *The Single Transferable Vote.* (India: Higginbothams, 1946.) Pp. 99. Rs. 1-8.

American Journal of International Law.

The contents include the following:—

January, 1946. The Twenty-fourth year of the World Court, Manley O. Hudson; International Administration of European Inland Waterways, Lewis B. Wehle; Recent Aspects of the Calvo Doctrine and the Challenge to International Law, Alwyn V. Freeman.

April, 1946. Further developments concerning jurisdiction over Friendly Foreign Armed Forces, Archibald King; Pending Projects of the International Technical Committee of Aerial Legal Experts, Stephen Latchford; The International Organization Immunities Act, Lawrence Preuss; The First Meeting of the General Assembly, Walter H. C. Laves and Francis O. Wilcox.

July, 1946. Questions of Guerilla Warfare in the Law of War, J. P. Frainin; Legality of Guerrilla Forces under the Laws of War, Lester Nurick and Roger W. Barrett; Manchurian Booty and International Law, Daniel H. Law.

Cardwell, Anne Sue. *The Case for Poland.* (Mich. Ann Arbor Press, 1945.) Pp. 92. 25c.

County Court Manual. (London: H.M. Stationery Office, 1946.) Pp. 128. 2s.

Mr. R. C. L. Gregory, formerly a Senior Clerk in the County Courts and now an Associate in the High Court, has prepared under the direction of the County Courts Branch of the Lord Chancellor's Department, a manual on County Court procedure to be used in the training of new entrants to the offices of the Courts and District Registrars. It will also serve a similar purpose in the training of clerks in the offices of solicitors whose business takes them into County Courts. As an official publication the manual can be relied upon to provide accurate information upon the origin and constitution of the Courts and the actions which can be tried in them, together with particulars of the enforcement of their orders and the special jurisdiction which is exercised in such matters as admiralty, bankruptcy and matrimonial causes, together with a final section dealing with emergency legislation.

Domke, Martin and Kellor, Francis. *Western Hemisphere Systems of Commercial Arbitration.* (Reprinted from *Toronto Law Journal,* Vol. VI, No. 2, 1946.) Pp. 24.

Duncan, G. A. *Charles Francis Bastable.* (Oxford University Press: Geoffrey Cumberlege, 1946.) Pp. 4. 1s. 3d.

Études de Science Criminelle et de Froit Pénal Comparé. (Paris: Librarie du Recueil Sirey, 1945.) Pp. 418.

Federal Rules of Criminal Procedure. Edited by Hon. Alexander Hotzoff. (N.Y. University School of Law, 1946.) Pp. xxi, 335.

The Hon. Tom C. Clark, Attorney General of the United States, introduces the

[24] Mention here does not preclude review later.

adoption of the Federal Rules of Criminal Procedure as " a milestone of progress on the road leading to an improvement in the administration of criminal justice." They are the work of an advisory committee appointed especially by the United States Supreme Court and the precedent has been followed of the Rules of Civil Procedure, which were adopted on February 3, 1941. The effect of the Rules is to remove the bewildering complexity in the forms of procedure which frequently operated to the detriment of the administration of justice. The Attorney General claims for these Rules that they are " the essence of brevity, simplicity and uniformity. They expedite proceedings from arrest through verdict and appeal, yet throughout they remain faithful to the traditional procedure familiar to all lawyers. Procedure prescribed by the precise, unequivocal language of the Rules does violence to dilatory practice, delay and needless expense."

Following the promulgation of the Rules their contents were made more widely known through the proceedings of the Institute conducted by the New York University School of Law in collaboration with the section of the Criminal Law of the American Bar Association, the New York State Bar Association, of the Federal Bar Association of New York, New Jersey and Connecticut, of which a full report is printed with the Rules. In addition there are model forms for use in criminal procedure.

Mr. Justice Hotzoff, who was Secretary of the Advisory Committee and has edited the volume, hopes that these Rules may be generally acceptable for adoption by the State Courts and so remove the inconsistencies and anomalies which now prevail in various States, to the ultimate benefit of the administration of Criminal justice throughout the whole of the United States.

Forte, Albert N. *L'Impot sur les Successions En Egypte.* (Le Caire: Imprimerie Nationale.) Pp. 373-608. P.T. 40.

Fredericq, Louis. *Traite de Droit Commercial Belge.* Tome I. (Gand: Rombaut Fecheyr, 1946.) Pp. 714.

German Major War Criminals, Trial of. Part 1. Speeches of the Chief Prosecutors. (London: H.M. Stationery Office, 1946.) Pp. xi, 327. 5s. Pp. 173, 2s. 6d. Pp. 200, 3s. 6d.

The proceedings of the International Military Tribunal at Nuremburg are to be published in a series of volumes which are being issued in fortnightly parts. The first contains the proceedings between November 20, 1945, and December 1, 1945; the second, the opening speeches of the Chief Prosecutors for the United States, French Republic, United Kingdom and the Union of Soviet Socialist Republics. The third contains the speeches of the Chief Prosecutors at the close of the case against the individual defendants.

Germany: Control Commission. *Official Military Government Gazette.* (London: H.M. Stationery Office.) Pp. 19, 6d. Pp. 53, 6d. Pp. 16, 6d.

Glueck, Sheldon & Glueck, Eleanor T. *The After Conduct of Discharged Offenders.* (London: Macmillan & Co., 1945.) Pp. xvi, 114. 8s. 6d.

Mr. Justice Frankfurter introduces this work by two members of the staff of the Harvard Law School which has been included in the English Studies in Criminal Science. Professor Winfield contributes a preface. The study is mainly concerned to plead for a scientific investigation of the results of punishment upon the offenders. It provides particulars relating to a sample comprising a thousand boy delinquents and five hundred young adult male criminals who had come under the control of the suitable reforming agencies in the State of Massachusetts. The figures previously made available had helped " to shatter the fond illusions most persons had held about the high efficacy of many of the existing régimes in preventing the further evolution of criminal careers." Accordingly they advocate follow-up investigations as " the construction of prognostic instruments " in the administration of criminal justice. Their investigations lead them to the conclusion that " punishment in the sense of the infliction of painful suffering, does not sufficiently affect the deeper springs of personality and human character to bring about reform." In fact, its unfavourable reactions may even exceed its favourable. Accordingly they advocate the substitution in the place of the generally recognized procedure of a " psychologic-sociologic sentencing agency."

Guetzevitch, Boris Mirkine. *La quatrième République.* (N.Y.: Editions de la Maison Française, Inc., 1946.) Pp. 267.

Hellenic Institute of International and Foreign Law. Statutes. (Athens: National Stationery Office, 1940.) Pp. 11.

India. *Supplement to the General Rules and Orders.* Vols. VI, VII, VIII. (Delhi: Government of India Press.) Pp. 489, 27s. Pp. 280, 19s. Pp. 358 20s. 6d.

Juridical Review. August, 1945.

The number for August, 1945, contains a somewhat unusual article by Canon Phythian-Adams setting forth a novel theory as to how Darnley came to die. Darnley's almost naked but uninjured body was found in an orchard adjoining Kirk o' Field, following upon the explosion by which the house itself was destroyed. Canon Adams draws attention to the posture of the bodies of Darnley and his servant as depicted in a contemporary drawing of the tragedy. He contends that the victims were killed by the blast from the explosion and cites modern instances. It seems rather rash to draw inferences from a sixteenth century drawing, of the origin of which we know nothing, as though it was a modern police photograph of the scene. But if we grant the Canon's premises his inference is reasonable. Who stored the gunpowder and who lit the fuse? The Canon dismisses Bothwell " without hesitation." Others have doubted, or even denied, Bothwell's generally accepted guilt but the Canon is perhaps the first to acquit him " without hesitation." This however, is not the place to argue the matter. Oddly enough Bothwell's recent apologist, Mr. R. Gore-Browne is of the opinion that Bothwell fired the fuse though he was not responsible for storing the powder. Darnley himself had stored the powder, intending to blow up Mary! Bothwell, finding the powder, thought that if " the treacherous boy upstairs wanted an explosion, he should have one." In fact, the " boy " was already in the garden. But if he died as a result of an explosion criminally caused by Bothwell, it would appear to follow that Bothwell was legally the murderer. This, however, may not have been Scots Law in 1567.

F. M. G.

Mannheim, Hermann. *Criminal Justice and Social Reconstruction.* (London: Kegan, Paul Trench & Trubner Co. Ltd., 1946.) Pp. x, 290. 15s.

Modern Law Manual for Practitioners. Under the General Editorship of N. P. Shannon. Second Edition. (London: Sweet & Maxwell, 1946.) Pp. lxxvi, 768. 35s.

The rapidity with which the first edition of this work was sold out justified the expectations of the President, Sir Arthur Morgan, and the Council of the Law Society that a work, covering the changes in the law during the war years, would be welcome. It has not only been found valuable by English lawyers but is particularly useful to others who want a concise and reliable statement of the latest developments of English law.

Penal Reform in England. Edited by L. Radzinowicz and J. C. W. Turner. (London: Macmillan & Co., 1946.) Pp. vii, 192. 12s. 6d.

Permanent Court of International Justice, Sixteenth Report. Series E—No. 16, July 15, 1939-December 31, 1945. (Leyden: A. W. Sijthoff's Pub. Co.) Pp. 454.

Pollock's Principles of Contract. Twelfth Edition by P. H. Winfield. (London: Stevens & Sons, 1946.) Pp. xl, 602. 40s.

In spite of the importance of Prof. Winfield's new edition of Pollock's Contracts, it will perhaps be enough if its appearance is simply noted and welcomed here. Pollock's work is, and has long been, a classic; Prof. Winfield's merits as an editor are as well known as is the value of his original publications; and readers are no doubt familiar with the eleventh edition, also by Prof. Winfield. The profession may however congratulate itself that Pollock's book continues to receive the scrupulous care of so excellent an editor, in spite of the many calls upon his time.

The editor notes in his preface that " considerable alterations and some additions have been made in this edition," though the editor continues his commendable practice of distinguishing from Pollock's text his own contributions. The changes due to legislation and judicial decisions need no comment here; but it should be noted that Prof. Winfield has written a whole new chapter on " Remedies for Breach of Contract," a subject which was outside the scope of the book as envisaged by Pollock. The absence of such a chapter was however much regretted by critics and students alike; and its inclusion now is welcome, as is also the addition of a Table of Statutes.

Owing to printing delays, the law is stated as at November, 1945.

C. J. H.

Revista Juridica de la Universidad de Puerto Rico. Volumen XV. Enero-Febrero, 1946. Numero 3.

This issue of the Puerto Rico University Law Review contains two most interesting articles on problems of administrative law, not unfamiliar to English readers. Professor Amadeo (of the University of Puerto Rico) deals with a typical instance of judicial control of administrative activities. Questions relating to workmen's compensation are in Puerto Rico decided by an administrative agency, the Industrial Commission. From this Commission an appeal lies to the Supreme Court. But the appeal is confined to questions of law. On questions of fact the Industrial Commission has final jurisdiction. Professor Amadeo analyses the conception of " question of law " developed by the Supreme Court. The cases which he quotes prove that judicial control of administrative agencies is anything but an empty formality. The Supreme Court had ample opportunity to correct errors committed by the administrative agency. Some are of a rather elementary character. It is little surprising that the Supreme Court has interpreted the term " question of law " rather widely. Both the decisions of the Court and their treatment by the author are characteristic of the Anglo-American approach to legal questions which obtains to-day in Puerto Rico. The article by Professor Romay (of the University of Habana) leads into a very different world of legal thought. It deals with the conception of " administrative procedure." This conception is far wider than that of " procedure of administrative courts." It designates the adjective law applied by administrative agencies in general. There are a number of general rules which govern the proceedings by and before any administrative agency. The substantive administrative law must be supplemented by an adjective administrative law. Both the conception as well as the author's approach are typical of the deductive reasoning, familiar to Continental lawyers. Yet there can be little doubt that this approach too can produce results of great practical importance. Induction and deduction are complementary: neither excludes the other. The issue also contains a thoughtful review of Dr. Allen's *Law and Orders*.

E. J. Cohn.

Arquivo de Direito Militar. Publicacao Quadrimestral fundada pelo General Eurico G. Dutra, ministro da Guerra. Ano IV, No. 2. (Rio de Janeiro, 1946. Imprensa Nacional.)

A Review of Military Law published quarterly by a state-owned publishing house would fill lawyers in this country who are specialising in this field of law, only very occasionally dealt with in general legal periodicals, with envy, even if it were of less considerable bulk than this Brazilian publication. The present number consists again of well over 500 pages. The present issue contains drafts of a Military Penal Code and a Code of Military Criminal Procedure together with detailed " Motives."

E. J. C.

Sara, Albert. *La Responsabilité du Fait Des Choses Inanimees.* (Paris: Librarie Generale de Droit et de Jurisprudence,) Pp. 212.

Savelberg, M. M. L., *Le problème du Droit International Américain.* (La Haye: A. A. M. Stols, 1946.) Pp. xix, 361.

South Australian Industrial Reports. Vol. XVIII, 1944. Edited by G. C. Douglas Bowen. (Adelaide: Government Printer, 1945.) Pp. vii, 267, vii.

Among the cases reported in this volume which are of general interest is the Municipal Officers Board Determination Case in which the President discussed the position of the Industrial Board as arising from the difference in the legislation in New South Wales and South Australia. In *Western* v. *Baldock* he had occasion to examine the meaning of the " coffee palace " in England and he found that it was not the same as in Australia where he defined it to be " an unlicensed hotel, or in more extended words, a house in which board and lodging and everything which travellers ordinarily require (other than intoxicating liquors) are supplied to the public. The expression used clearly includes the supply of meals to members of the public whether or not they are lodging in the house."

In the Bread Carters Board Determination (Interpretation) Case the President surveyed the decisions in *Marrison* v. *Bell* [1939] 2 K.B. 137, *Petrie* v. *Mac Fisheries* [1940] 1 K.B. 258, and *O'Grady* v. *M. Saper Ltd.* [1940] 2 K.B. 469, and came to the conclusion that the whole question of payment of staff during sickness depends upon the intention of the parties. Also he was prepared to assume that " where

there is a contract of hiring by the week in the absence of a term express or implied to the contrary that the parties intended that the employee was to be paid his week's wages although absent through sickness."

The longest report in the volume is devoted to a discussion of the position of Public School Teachers, in which the President found that school teaching is a profession *sui generis* and proceeded to give a description of its relationship to other "career industries."

The Adelaide Electric Supply Company's Salaried Officers' Association Case involved the description of the distinction between salaries and wages which has occupied the attention of the English Courts particularly in *Moriarty* v. *Regent's Garage Company* [1921] 1 K.B. 423, from which the President accepted the judgments of Lush J. and McCardie J. and came to the conclusion that the permanency of employment is the most important conception in the present day use in Australia of the word "salary" though he included as additional possible elements: (1) a somewhat higher type of service; and (2) a computation of remuneration by a somewhat long period, say by the quarter or the year.

State Law Index, 1943-1944. Tenth Biennial Volume. (Washington: Gov. Printing Office, 1945.) Pp. vii, 789.

Varadachariar, S. *The Hindu Judicial System*. (India: Lucknow University, 1946.) Pp. x, 267.

Wille, George. *Principles of South African Law*. Second Edition. (Cape Town: Juta & Co., 1945.) Pp. lviii, 533.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Arquivo de Direito Militar; Australian Law Journal; Baltic Review; Bombay Law Journal; Bombay Law Report; Calcutta Weekly Notes; Canadian Bar Review; Columbia Law Review; Eugenics Review; Hindustan Review; International Law Review; International Review of Agriculture; Journal de Jurisprudence Hellénique et Étrangère; Journal of the Parliaments of the Empire; Journal of the Society of Clerks-at-the-Table in Empire Parliaments; Juridical Review; Madras Law Journal; Medico-Legal Review; Modern Law Review; Revista Juridica de la Universidad de Puerto Rico; Revue International de la Croix Rouge; Revue de Science Criminelle et de Droit Penal Compare; South African Law Journal; Toronto University Law Review; Tulane Law Review.

THE JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW

THIRD SERIES—Vol. XXVII
Parts I & II

Issued to Subscribers only. May, 1945